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Attorneys for Plaintiff Bobbie McDow

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

BOBBIE MCDOW,

Plaintiff,

vs.

LORA REINBOLD,

Defendant.

Case No. 3AN-21-05615 CI

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW the plaintiff, Bobbie McDow, by and through counsel, the Northern Justice Project, LLC, and hereby moves, pursuant to Alaska Civil Rule 56(a), for partial summary judgment on the central legal question in this case: whether the defendant, State Senator Lora Reinbold, violated art. 1, sec. 5 of the Alaska Constitution by banning Ms. McDow from the "Senator Lora Reinbold" Facebook page.

Partial summary judgment is appropriate because there are no material disputes of fact that need to be resolved before the Court rules on this question. Indeed, as a matter of law, it is clear that (1) State Senator Reinbold was acting as a government actor when she banned Ms. McDow from the "Senator Lora Reinbold" Facebook page; (2) the "Senator Lora

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

*McDow v. Reinbold*, Case No. 3AN-21-05615 CI

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Reinbold” Facebook page is a “public forum,” and (3) the banning was driven by Ms. McDow’s expressed viewpoint and amounted to viewpoint discrimination. Furthermore, even if the banning was for content-neutral reasons, it was still unconstitutional. And this is all particularly clear given the stauncher protections for free speech that are enshrined in the Alaska Constitution vis-à-vis the United States Constitution.

This motion is supported by an accompanying memorandum, an affidavit, exhibits, and a proposed order.

DATED this 21st day of October, 2021

NORTHERN JUSTICE PROJECT, LLC  
Attorneys for Plaintiff

By: /s/ James J. Davis, Jr.

James J. Davis, Jr., AK Bar No. 9412140  
Goriune Dudukgian, AK Bar No. 0506051

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of  
the foregoing document was served via email on

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/s/ Nicholas Feronti 10/21/21

claims that the page “is separate from the state government” and “the foundations of its existence are [her] private and sovereign acts,” so she “has every natural right to accept or dismiss anyone’s opinion, on any issue . . . .”<sup>2</sup> She argues that the page is not a public forum, and she is not a government actor when she bans constituents from it, and it is thus legitimate for her to discriminate against constituents based on their viewpoints.<sup>3</sup>

In support of these sweeping conclusions, State Senator Reinbold claims that the “Senator Lora Reinbold” Facebook page was not created by a legislative IT department, is managed “of her own volition,” is not an “official” state page, is not funded by the state, is maintained by “personal choice,” and is “not a public park.”<sup>4</sup>

However, these are red herrings that misunderstand the legal standard for what makes “government action” or a “public forum” vis-à-vis social media. In reality, a Facebook page can still be a public forum even when operated by “personal choice” or not funded by a government, and a government official can be a government actor when banning a citizen from such a page.

Instead, and in accord with actual case law on this issue, what matters is the totality of circumstances.<sup>5</sup> That includes things like the page’s title, if it is noted as one of a “government

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<sup>2</sup> *Id.* Ms. Reinbold never explains how or why she is a “sovereign” unto herself.

<sup>3</sup> *Id.* at 2 and 12.

<sup>4</sup> *Id.* at 2; *see also* Supporting Affidavit of Defendant.

<sup>5</sup> *Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019); *see also Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019), cert. granted, judgment vacated as moot sub nom *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

official,” or if the government official also maintained a separate and personal social media account.<sup>6</sup> It also includes whether the page is used as a “tool of governance,” like when it is used to announce policies, promote a legislative agenda, provide information about official activities, or post content about matters related to an official’s government office.<sup>7</sup>

Here, such considerations, and others like them, show that the “Senator Lora Reinbold” Facebook page is indeed a public forum, and that she is indeed a government actor when maintaining the page. This is so even if all of her factual claims are true. In turn, when State Senator Reinbold bans constituents, like plaintiff Bobbie McDow, from the page based on their viewpoints, that is unconstitutional. This Court should thus grant this motion for partial summary judgment.

## II. STATEMENT OF UNDISPUTED FACTS

State Senator Reinbold has a Facebook page titled “Senator Lora Reinbold,”<sup>8</sup> which also notes that Ms. Reinbold is a “government official.”<sup>9</sup> The page’s stated intent “is to help educate viewers about issues facing” Alaska.<sup>10</sup> The page features a picture of State Senator Reinbold giving a speech.<sup>11</sup> The page is “liked” by thousands of people.<sup>12</sup> The page is

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Motion to Dismiss at Exhibit B.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

“followed” by thousands of people.<sup>13</sup> The page features people corresponding and debating about political issues.<sup>14</sup> The features of the page are made available to all Facebook users.<sup>15</sup>

This page was initially created on January 25, 2013, around when Ms. Reinbold was first elected to the Alaska legislature.<sup>16</sup> The page was initially named “Representative Lora Reinbold,” corresponding with Ms. Reinbold’s election to the Alaska House of Representatives.<sup>17</sup> The page was later renamed “Senator Lora Reinbold” on January 25, 2019, around when Ms. Reinbold was first elected to the Alaska Senate.<sup>18</sup> The “Senator Lora Reinbold” Facebook page is distinct from Ms. Reinbold’s personal profile, which is titled “Lora Reinbold,” and was created in July 2009, years before she was elected to office.<sup>19</sup>

The “Senator Lora Reinbold” Facebook page includes hundreds of videos, photos, posts, and comments about political matters.<sup>20</sup> For example, the page has videos of Ms. Reinbold speaking on political matters, like an “official comprehensive response to the governor,” and “The Reinbold Report” where Ms. Reinbold provides updates about

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at Exhibits D, E, F, G, H, I, J, K, L, and N.

<sup>15</sup> *Id.* at Exhibit B (in the defendant’s own screenshot, no restrictions are shown for liking the page, messaging Ms. Reinbold, or even calling her).

<sup>16</sup> Screenshot verification of this appears in plaintiff’s *First Amended Complaint* at 5.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 12-14.

legislation.<sup>21</sup> The page has photographs of political matters, like legislative proceedings, rallies, Ms. Reinbold speaking in a legislative judiciary committee, or highlights on legislative documents.<sup>22</sup> The page also has posts and comments about political matters, including about things like State Senator Reinbold asking people to call in and give public testimony about legislation.<sup>23</sup> State Senator Reinbold's posts on the page have taken place during traditional work hours.<sup>24</sup> The page includes articles about political matters.<sup>25</sup> Ms. Reinbold has directly responded to questions on the page about legislative issues, for instance about the state's legislative council.<sup>26</sup>

State Senator Lora Reinbold's staff has monitored communication on the page, and responded with outreach to constituents on Alaska State Legislature letterhead.<sup>27</sup>

Typically, people can interact with the "Senator Lora Reinbold" Facebook page by "liking" posts on the page, responding to posts with emojis, commenting on the page's posts, reading comments of others, responding to comments of others, and reading those responses.<sup>28</sup>

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<sup>21</sup> *Id.* at 7.

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at 9.

<sup>24</sup> *Id.* (showing a timestamp of 1:40 pm).

<sup>25</sup> *Id.* at 17.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> Motion to Dismiss at Exhibit M; *see also id.* at page 5 ("On social media Plaintiff indicated that she wanted Defendant to work on domestic violence issues. Defendant [then] made Plaintiff aware of a domestic violence work group [via a letter]").

<sup>28</sup> *First Amended Complaint* at 9-13.

Posts on the page have generated thousands of comments and replies.<sup>29</sup> People can also interact with the page by directly messaging Ms. Reinbold.<sup>30</sup>

Bobbie McDow is a constituent of Ms. Reinbold,<sup>31</sup> and has used the “Senator Lora Reinbold” Facebook page.<sup>32</sup> She has commented on State Senator Reinbold’s posts on the page,<sup>33</sup> and has responded and replied to comments and posts made by others on the page.<sup>34</sup> She has responded to posts made by State Senator Reinbold on the page by “liking” the posts.<sup>35</sup> She has also responded to comments by other people, besides State Senator Reinbold, on the page by “liking” those comments.<sup>36</sup>

On April 29, 2021, Ms. McDow was banned from the “Senator Lora Reinbold” Facebook page.<sup>37</sup> This banning occurred after, among other things, Ms. McDow critiqued State Senator Reinbold’s position against wearing masks during the COVID-19 pandemic.<sup>38</sup>

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<sup>29</sup> *Id.* at 12.

<sup>30</sup> *Id.* at 13.

<sup>31</sup> Affidavit of Bobbie McDow in Support of Plaintiff’s Motion for Partial Summary Judgment (hereinafter “McDow Aff.”) at ¶1.

<sup>32</sup> *Id.* at ¶2.

<sup>33</sup> *Id.* at ¶3.

<sup>34</sup> *Id.* at ¶4.

<sup>35</sup> *Id.* at ¶5.

<sup>36</sup> *Id.* at ¶6.

<sup>37</sup> *Id.* at ¶7; Motion to Dismiss at 4.

<sup>38</sup> McDow Aff. at ¶8.

According to Facebook, “[w]hen you ban someone from your Page, they’ll . . . no longer be able to publish to your Page, like or comment on your Page’s posts, message your Page or like your page.”<sup>39</sup> When State Senator Reinbold banned Ms. McDow from the “Senator Lora Reinbold” Facebook page, this is what happened: Ms. McDow was no longer able to like or comment on posts by State Senator Reinbold, or on comments that others posted on the page.<sup>40</sup> She was also no longer able to access the “message” option on the page.<sup>41</sup> Her past comments and replies were also removed or hidden from the page.<sup>42</sup>

A full and fair exchange of ideas on the current pandemic is important to an informed polity,<sup>43</sup> and is literally a matter of life and death in our community.<sup>44</sup>

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<sup>39</sup> See Facebook “Help Center,” which can be viewed at <https://www.facebook.com/help/185897171460026> (last accessed October 19, 2021).

<sup>40</sup> McDow Aff. at ¶9.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J, dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”).

<sup>44</sup> See, for example, articles from the Anchorage Daily News attached as Exhibit 1, including headlines like “State reports new record for hospitalizations” (September 9, 2021), “Rural hospitals struggle to transfer patients as COVID-19 hospitalizations hit new high” (September 12, 2021), “Hospital numbers, at all-time high, don’t tell the whole story” (September 13, 2021), “State’s largest hospital rationing care under crisis standards” (September 15, 2021), “State’s COVID-19 case rate is now highest in nation” (September 22, 2021), “Crisis standards of care activated for entire state” (September 23, 2021), “Alaska hits new daily record with over 1,200 COVID-19 cases reported” (September 23, 2021), “Crisis standards of care now active for 20 facilities” (October 3, 2021), and “Hospitals in flux with near-record patient numbers (October 5, 2021).



### III. ARGUMENT AND AUTHORITIES

#### A. The Applicable Legal Framework.

It is well-settled that government officials cannot impose viewpoint-based or other overbroad restrictions on speech in public forums.<sup>45</sup> It is also well understood that social media, and Facebook in particular, are now essential forums for public speech.<sup>46</sup> Here, the legal question is whether State Senator Reinbold violated art. 1, sec. 5 of the Alaska Constitution by banning Ms. McDow from the “Senator Lora Reinbold” Facebook page.

Courts have approached this question in three steps by determining: 1) if the official was acting as a government actor; 2) if the social media page at issue is a “public forum;” and 3) if the banning was driven by a plaintiff’s viewpoints.<sup>47</sup> These steps are addressed below, followed briefly by two other considerations that also bode against Ms. Reinbold.

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<sup>45</sup> See, e.g., *Vogler v. Miller*, 651 P.2d 1, 5 (Alaska 1982) (“[O]nly a regulation which impinges on the right to speak and associate to the least degree possible consistent with the achievement of the state’s legitimate goals will pass constitutional muster.”); *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 205 (Alaska 2007) (“It is exceedingly rare that any law restricting speech based on its content or viewpoint will be upheld, for the United States Supreme Court has stated that ‘[c]ontent-based regulations are presumptively invalid.’ Such restrictions are subject to the strictest scrutiny, and ‘only a regulation which impinges on the right to speak and associate to the least possible degree consistent with the achievement of the state’s legitimate goals will pass constitutional muster.’”) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)); see also *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (“[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that the government may not “discriminate against speech on the basis of ... viewpoint.”)).

<sup>46</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (noting that social media platforms, like Facebook, are the “modern public square” and provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”).

<sup>47</sup> *Faison v. Jones*, 440 F. Supp. 3d 1123, 1132-36 (E.D. Cal. 2020) (granting injunction to unblock users via analysis of state action, public forum, and viewpoint discrimination).

**B. State Senator Reinbold Operates the “Senator Lora Reinbold” Facebook Page as a Government Actor and Not a Private Speaker.**

A totality of the circumstances determines if conduct is government action.<sup>48</sup> For an act to be government action, there must be a sufficient nexus between the state and the act.<sup>49</sup>

The U.S. Supreme Court and Alaska Supreme Court have yet to address government action vis-a-vis a government official blocking a citizen on social media. However, other courts recently addressed the issue, including the Second and Fourth Circuits. Those two cases are recapped below, followed by an analysis of why Ms. Reinbold is a government actor here.

In *Knight First Amend. Inst. at Columbia Univ. v. Trump*, the Second Circuit decided whether Donald Trump was a government actor or private citizen when he banned people from a private Twitter account that he established before he ran for office.<sup>50</sup> In its analysis, the Court found that Mr. Trump used the account to announce, describe, and defend his policies; to promote his legislative agenda; to announce official decisions; to challenge media coverage; and to interact with members of the public about his policies.<sup>51</sup> Given these factors, the court held that Mr. Trump was a government actor vis-à-vis his private Twitter account:

Here, a public official and his subordinates hold out and use a social media account open to the public as an official account for conducting official business. That account has interactive features open to the public, making

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<sup>48</sup> *Skinner v. Ry. Labor Executives' Assoc.*, 489 U.S. 602, 614-15 (1989). Note that courts often use the terms “government action” or “state action” interchangeably.

<sup>49</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974); *see also L.P. v. Marian Catholic High Sch.*, 852 F.3d 690, 696 (7th Cir. 2017) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

<sup>50</sup> 928 F.3d 226, 231 (2d Cir. 2019), cert. granted, judgment vacated as moot sub nom. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

<sup>51</sup> *Id.*

public interaction a prominent feature of the account. These factors mean that the account is not private. *See generally Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (applying the same principles to “metaphysical” forums as to those that exist in “a spatial or geographic sense”); *see also Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019) (holding that a public official who used a Facebook Page as a tool of her office exercised state action when banning a constituent); *Robinson v. Hunt Cty., Texas*, 921 F.3d 440, 447 (5th Cir. 2019) (finding that a government official’s act of banning a constituent from an official government social media page was unconstitutional viewpoint discrimination). Accordingly, the President excluded the Individual Plaintiffs from government-controlled property when he used the blocking function of the Account to exclude disfavored voices.<sup>52</sup>

The Fourth Circuit case of *Davison v. Randall*,<sup>53</sup> cited by *Knight*, is also instructive. There, the chair of a county board banned a constituent from her “Chair Phyllis J. Randall” Facebook page, because the constituent posted criticisms.<sup>54</sup> When the constituent sued, the government official argued, as Reinbold does here, that the First Amendment did not apply because she was acting as a private citizen.<sup>55</sup> The Fourth Circuit found that this argument elevated form over substance and, after considering the totality of circumstances, rejected it:

In the context of an alleged First Amendment violation, in particular, this Court has found that a challenged action by a governmental official is fairly attributable to the state when “the sole intention” of the official in taking the action was “to suppress speech critical of his conduct of official duties or fitness for public office.”

Here, after thoroughly analyzing the totality of the circumstances surrounding Randall’s creation and administration of the Chair’s Facebook Page and banning of Davison from that page, the district court concluded that Randall acted under color of state law. We agree.

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<sup>52</sup> *Id.*

<sup>53</sup> 912 F.3d 666, 680 (4th Cir. 2019).

<sup>54</sup> *Id.* at 675.

<sup>55</sup> *Id.* at 679.

Randall created and administered the Chair's Facebook Page to further her duties as a municipal official. She used the Chair's Facebook Page "as a tool of governance": through the Chair's Facebook Page, Randall provides information to the public about her and the Loudoun Board's official activities and solicits input from the public on policy issues she and the Loudoun Board confront.

For instance, Randall used the Chair's Facebook Page to inform the public about serious public safety events and to keep her constituents abreast of the County's response to a snowstorm and to coordinate snow removal activities.

And, as the district court correctly emphasized, Randall swathe[d] the [Chair's Facebook Page] in the trappings of her office. Among other things, (1) the title of the page includes [Randall]'s title; (2) the page is categorized as that of a government official; (3) the page lists as contact information [Randall]'s official County email address and the telephone number of [Randall]'s County office; (4) the page includes the web address of [Randall]'s official County website; (5) many—perhaps most—of the posts are expressly addressed to "Loudoun," [Randall]'s constituents; (6) [Randall] has submitted posts on behalf of the [Loudoun Board] as a whole; (7) [Randall] has asked her constituents to use the [Chair's Facebook Page] as a channel for "back and forth constituent conversations"; and (8) the content posted has a strong tendency toward matters related to [Randall]'s office.

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Put simply, Randall clothed the Chair's Facebook Page in "the power and prestige of h[er] state office," *Harris*, and created and administered the page to "perform[] actual or apparent dut[ies] of h[er] office."

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That Randall's ban of Davison amounted to an effort "to suppress speech critical of [such members'] conduct of [their] official duties or fitness for public office" further reinforces that the ban was taken under color of state law. Considering the totality of these circumstances, the district court correctly held that Randall acted under color of state law in banning Davison from the Chair's Facebook Page.<sup>56</sup>

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<sup>56</sup> *Id.* at 680-81 (citations omitted). *See also Attwood v. Clemons*, 818 F. App'x 863, 867 (11<sup>th</sup> Cir. 2000) (following *Davison* and *Knight* and declining to dismiss a free speech claim when a government official, who "adorn[ed] his social media accounts with all the trappings of his state office," blocked a user from accessing that account).

Here, as in *Knight* and *Davison*, the totality of circumstances show that State Senator Reinbold was a government actor when banning Ms. McDow from the “Senator Lora Reinbold” Facebook page. Among other things:

1. The Facebook page is titled “Senator Lora Reinbold”<sup>57</sup>
2. The page was categorized as that of a “government official.”<sup>58</sup>
3. The page’s stated intent “is to help educate viewers about issues facing” Alaska.<sup>59</sup>
4. The page features a picture of State Senator Reinbold giving a speech.<sup>60</sup>
5. The page features people corresponding and debating political issues.<sup>61</sup>
6. The page is “liked” by thousands of people.<sup>62</sup>
7. The page is “followed” by thousands of people.<sup>63</sup>
8. State Senator Lora Reinbold’s staff monitors communication on the page and does so to coordinate outreach to constituents on Alaska State Legislature letterhead.<sup>64</sup>
9. The features of the page are made available to all Facebook users.<sup>65</sup>

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<sup>57</sup> Motion to Dismiss at Exhibit B.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at Exhibits D, E, F, G, H, I, J, K, L, and N.

<sup>62</sup> *Id.* at Exhibit B.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at Exhibit M; *see also id.* at page 5 (“On social media Plaintiff indicated that she wanted Defendant to work on domestic violence issues. Defendant [then] made Plaintiff aware of a domestic violence work group [via a letter]”).

<sup>65</sup> *Id.* at Exhibit B (in the defendant’s own screenshot, no restrictions are shown for liking the page, messaging Ms. Reinbold, or even calling her).

10. The page was created on January 25, 2013, around when Ms. Reinbold was first elected to the Alaska House of Representatives.<sup>66</sup> It was initially titled “Representative Lora Reinbold” to correspond with that service.<sup>67</sup>
11. The page was renamed “Senator Lora Reinbold” on January 25, 2019, around when Ms. Reinbold was first elected to the Alaska Senate.<sup>68</sup>
12. The page is distinct from Ms. Reinbold’s personal profile, which is titled “Lora Reinbold,” and was created in July 2009, years before she was elected to office.<sup>69</sup>
13. The page includes videos of political matters, such as an “official comprehensive response to the governor,” and such as “The Reinbold Report,” where Ms. Reinbold provides updates about legislation.<sup>70</sup>
14. The page includes photographs of political matters, like of legislative proceedings, rallies, Ms. Reinbold speaking, or highlights on legislative documents.<sup>71</sup>
15. The page includes posts and comments about political matters, including about things like asking people to call in and give public testimony about legislation.<sup>72</sup>
16. Ms. Reinbold’s posts on the page can take place during traditional work hours.<sup>73</sup>
17. The page includes articles about political matters.<sup>74</sup>
18. Ms. Reinbold has directly responded to questions on the page about legislative issues, for instance about the state’s legislative council.<sup>75</sup>

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<sup>66</sup> Screenshot verification of this appears in plaintiff’s *First Amended Complaint* at 5.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 6.

<sup>70</sup> *Id.* at 7.

<sup>71</sup> *Id.* at 8.

<sup>72</sup> *Id.* at 9.

<sup>73</sup> *Id.* (showing a timestamp of 1:40 pm).

<sup>74</sup> *Id.* at 17.

<sup>75</sup> *Id.* at 13.

Ms. Reinbold may retort, as in her motion to dismiss, by claiming that the page was not created by a legislative IT department, is operated “of her own volition,” or is not “funded” by the state.<sup>76</sup> Yet even ignoring the problems with such rationalizations in themselves (like how “volition” is meaningless in this context, or how Facebook is free and does not have to be “funded” by anyone in the first place), none of these quips alter the totality of circumstances. For example, in *Knight*, it is not as if the U.S. government had forcibly created or paid for Mr. Trump’s Twitter via a federal IT department; rather, the account was created by Mr. Trump – by his own volition – before he took office, and none of that invalidated constitutional protections for free speech.

At bottom, there is no dispute that State Senator Reinbold has swathed the “State Senator Reinbold” Facebook page in the trappings of her public office. The page was only created when she was elected to office, it has been named accordingly, and its use and voluminous content – and exchange of ideas – has been thoroughly consistent with the same.

**C. The “Senator Lora Reinbold” Facebook Page is a Public Forum.**

Beyond Ms. Reinbold being a government actor, this Court must also decide the related question of whether the “Senator Lora Reinbold” Facebook page was a “public forum.” A public forum is a “place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects.”<sup>77</sup>

Nor are public forums limited to physical spaces, like parks or sidewalks. Indeed, the U.S. Supreme Court has already analogized social media sites, like Facebook, to “traditional”

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<sup>76</sup> Defendant’s Motion to Dismiss at 2.

<sup>77</sup> *Cornelius v. NAACP Leg. Def. Fund*, 473 U.S. 788, 802 (1985).

public forums, characterizing the internet as “the most important place for the exchange of views.”<sup>78</sup> When deciding if social media sites are public forums, courts have adopted a similar analysis to the government actor question address above. As the *Knight* court explained:

To determine whether a public forum has been created, courts look to the policy and practice of the government as well as the nature of the property and its compatibility with expressive activity to discern the government’s intent. Opening an instrumentality of communication for indiscriminate use by the general public creates a public forum. The Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation. We hold that this conduct created a public forum.<sup>79</sup>

*Davison* is also instructive on the consideration of social media as a public forum:

Although neither the Supreme Court nor any Circuit has squarely addressed whether, and in what circumstances, a governmental social media page—like the Chair’s Facebook Page—constitutes a public forum, aspects of the Chair’s Facebook Page bear the hallmarks of a public forum. Randall intentionally open[ed the public comment section of the Chair’s Facebook Page] for public discourse, inviting “ANY Loudoun citizen” to make posts to the comments section of the Chair’s Facebook Page—the interactive component of the page—“on ANY issues, request, criticism, complement or just your thoughts.” Randall placed no restrictions on the public’s access to the page or use of the interactive component of the Chair’s Facebook Page. And, in accordance with Randall’s invitation, the public made numerous posts on matters of public concern.

The Chair’s Facebook Page also is “compatib[le] with expressive activity. “Congress [has] recognized the internet and interactive computer services as offering ‘a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.’” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (quoting 47 U.S.C. § 230(a)(3)); *cf. Bland*, 730 F.3d at 386 (finding post to campaign Facebook

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<sup>78</sup> *Packingham*, 137 S. Ct. at 1735-36 (“In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’”) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

<sup>79</sup> *Knight*, 928 F.3d at 237 (internal citations and quotation marks omitted).



page “constituted pure speech”). And the Supreme Court recently analogized social media sites, like the Chair’s Facebook Page, to “traditional” public forums, characterizing the internet as “the most important place[] (in a spacial sense) for the exchange of views.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017). An “exchange of views” is precisely what Randall sought—and what in fact transpired—when she expressly invited “ANY Loudoun citizen” to visit the page and comment “on ANY issues,” and received numerous such posts and comments.<sup>80</sup>

Here, as in *Knight* and *Davison*, the “Senator Lora Reinbold” Facebook Page is a public forum. Many factors noted in the above analysis, of whether Ms. Reinbold was a government actor, apply with equal force on this issue. The plaintiff thus incorporates them here. For the sake of thoroughness, some particularly salient factors are worthy of repetition:

The page is open to and viewable by the public.<sup>81</sup> The page is “followed” and “liked” by thousands.<sup>82</sup> The page involves people exchanging views on political matters, “liking” and commenting on posts about the same, responding to such posts, and commenting on such posts by others.<sup>83</sup> Posts on the page have generated voluminous comments and replies about political matters.<sup>84</sup> And Ms. Reinbold has used the page to announce official legislative business, and to directly respond to questions from people about legislative issues.<sup>85</sup>

As such, the “Senator Lora Reinbold” Facebook page is like a town square, enabling robust political discourse on topics of public concern. As in *Davison*, Ms. Reinbold regularly

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<sup>80</sup> *Davison*, 912 F.3d at 682 (some internal citations omitted).

<sup>81</sup> Motion to Dismiss at Exhibit B.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at Exhibits D, E, F, G, H, I, J, K, L, and N.

<sup>84</sup> *Id.*

<sup>85</sup> Screenshot verification of this appears in plaintiff’s *First Amended Complaint* at 13.

posts about matters of public concern, does so in a variety of media, and has maintained open public comment – and an open exchange of ideas – about the same. This Court should thus find that the Page is a “public forum” for free speech purposes.

Ms. Reinbold, for her part, has argued:

It is Defendant’s personal choice to maintain the page, and to communicate on it with her viewers, when she desires to and as she sees fit to do, or not to do. It is her page, not a public park, or governmental forum, where anyone can do or say whatever they wish. Defendant’s page is not an official way to communicate with her.<sup>86</sup>

These conclusory notes, however, do not address the actual legal factors that determine if the page at issue is a public forum. Indeed, a public forum does not cease to be public just because it was created by “personal choice.” After all, it takes “personal choice” to build a sidewalk, but that does not sap it of its public qualities. Nor does a public forum, whether a sidewalk or website, cease to be public forum just because a government official quips that it “is not a public park.” Such proclamations are beside the point, and at odds with the law.

**D. State Senator Reinbold Engaged in Illegal Viewpoint Discrimination.**

The law creates a bright line: “If the Account is a forum—public or otherwise—viewpoint discrimination is not permitted by the government.”<sup>87</sup> Or, as *Davison* explained:

Viewpoint discrimination . . . is prohibited in all forums. Viewpoint discrimination . . . targets not subject matter, but particular views taken by speakers on a subject. Viewpoint discrimination is apparent, for example, if a government official’s decision to take a challenged action was impermissibly motivated by a desire to suppress a particular point of view.<sup>88</sup>

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<sup>86</sup> Defendant’s Motion to Dismiss at 7.

<sup>87</sup> *Knight*, 928 F.3d at 237.

<sup>88</sup> *Davison*, 912 F.3d at 687 (internal citations and quotation marks omitted).

Despite opening a public online forum for the exchange of information, Ms. Reinbold selectively deleted comments from the forum and banned various constituents, Ms. McDow being but one of them.<sup>89</sup> Indeed, on April 29, 2021, Ms. McDow was banned from the “Senator Lora Reinbold” Facebook page.<sup>90</sup> This banning included Ms. McDow no longer being able to like or comment on posts by State Senator Reinbold, or on comments that others posted on the page.<sup>91</sup> Ms. McDow was also no longer able to access the “message” option on the page,<sup>92</sup> and her past comments and replies were also removed or hidden from the page.<sup>93</sup>

Moreover, this banning occurred after, among other things, Ms. McDow critiqued State Senator Reinbold’s position against wearing masks during the COVID-19 pandemic.<sup>94</sup> This is undisputed. In State Senator Reinbold’s own Motion to Dismiss, she includes exhibits of various comments and posts by Ms. McDow on the “Senator Lora Reinbold” Facebook page, and acknowledges that she blocked Ms. McDow over such comments.<sup>95</sup> For instance, one of those exhibits shows Ms. McDow critiquing State Senator Reinbold for “rebell[ing] against her fellow law maker’s rules,” and then posting an article titled “An Alaska legislative

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<sup>89</sup> Screenshot verification of the banning of the plaintiff, and the deletion of her comments, appears in plaintiff’s First Amended Complaint at 19-24. Ms. Reinbold has also admitted to blocking Ms. McDow. *See* Motion to Dismiss at 4.

<sup>90</sup> McDow Aff. at ¶7; *see also* Motion to Dismiss at 4.

<sup>91</sup> McDow Aff. at ¶9.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at ¶8.

<sup>95</sup> Motion to Dismiss at 3-4, citing Exhibits D, E, F, G, H, I, J, K, and L.

aide's severe COVID-19 has heightened Senate reaction to anti-mask.”<sup>96</sup> Or, in another exhibit, Ms. McDow is shown commenting to ask State Senator Reinbold to “[p]lease comply with [her] fellow [legislators’] rules regarding COVID.”<sup>97</sup>

As such, State Senator Reinbold restricted Ms. McDow’s access to the “Senator Lora Reinbold” Facebook Page not as a fluke, but because Ms. McDow had the temerity to critique Ms. Reinbold’s position on the Covid pandemic and mask wearing. This is the definition of viewpoint discrimination.

**E. Reinbold’s Actions Were Unconstitutional Even if Content-Neutral.**

Moreover, *even if* Reinbold’s banning of Ms. McDow was not based on viewpoint she still violated the Alaska Constitution. Indeed, even content-neutral restrictions are subject to intermediate scrutiny and must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information.<sup>98</sup>

Further, “a content-neutral regulation does not necessarily fall with random or equal force upon different groups or different points of view.”<sup>99</sup> Instead, a “content-neutral regulation that restricts an inexpensive mode of communication will fall most heavily upon relatively poor speakers and the points of view that such speakers typically espouse.”<sup>100</sup> As

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<sup>96</sup> *Id.* at Exhibit L.

<sup>97</sup> *Id.* at Exhibit K.

<sup>98</sup> *Alaskans for a Common Language*, 170 P.3d at 205 (noting that the restrictions are only “valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”).

<sup>99</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 314 (1984).

<sup>100</sup> *Id.*

such, as Facebook is the quintessential inexpensive mode of communication and expression, limiting access to government officials' Facebook pages would specifically burden the efforts of the relatively disadvantaged or marginalized to convey their political ideas.

Here, no significant governmental interest would be served by arbitrarily banning individuals from participating in an online public forum. Today, social media represents perhaps the most significant channel for communication of information about public matters; there is simply no adequate alternative. Thus, under either strict or intermediate scrutiny, the challenged action is not sufficiently tailored to achieve any permissible governmental interest.

**F. The Alaska Constitution is Even More Protective of Free Speech than the Above-Mentioned Federal Case Law.**

Finally, Alaska's Constitution is more highly protective of free speech and association than the United States Constitution.<sup>101</sup> Indeed, in the specific areas of free speech and association, the Alaska Supreme Court has often held that the protections of the Alaska Constitution are broader than those recognized under the federal constitution.<sup>102</sup> Thus, even if this was a closer case – even if the strong decisions in *Davison* and *Knight* did not already reveal State Senator Reinbold's actions to be thoroughly unconstitutional – those decisions

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<sup>101</sup> *Club Sinrock, LLC v. Municipality of Anchorage*, 445 P.3d 1031, 1037 (Alaska 2019) (quoting *Baker v. City of Fairbanks*, 471 P.2d 386, 402 (Alaska 1970)) (“[W]e are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage.”)

<sup>102</sup> *See e.g., Club Sinrock, LLC v. Municipality of Anchorage*, 445 P.3d 1031, 1037 (Alaska 2019); *Vogler v. Miller*, 651 P.2d 1, 3-6 (Alaska 1982); *Breese v. Smith*, 501 P.2d 159, 166-72 (Alaska 1972); *Wickwire v. State*, 725 P.2d 695, 703 (Alaska 1986); *Alaskans for a Common Language v. Kritz*, 170 P.3d 183, 198 (Alaska 2007).

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would be but a *baseline* for the stronger protections enshrined in our state's constitution, which only makes it all the clearer that State Senator Reinbold has violated the law.

#### IV. CONCLUSION

At bottom, State Senator Reinbold was acting as a government actor when she banned Ms. McDow from the "Senator Lora Reinbold" Facebook page. Moreover, the page is a "public forum," and the banning was driven by Ms. McDow's expressed viewpoint. Furthermore, even if the banning was for content-neutral reasons, it was still unconstitutional. This is all particularly clear, given the stauncher protections for free speech that are enshrined in the Alaska Constitution vis-à-vis the United States Constitution. Thus, for all the foregoing reasons, Ms. McDow requests that this Court grant this motion for partial summary judgment.

DATED this 21st day of October, 2021

NORTHERN JUSTICE PROJECT, LLC  
Attorneys for Plaintiff

By: /s/ James J. Davis, Jr.

James J. Davis, Jr., AK Bar No. 9412140  
Goriune Dudukgian, AK Bar No. 0506051

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via email on

Heather M. Brown  
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Heather@franich.net  
info@franich.net

/s/ Nicholas Feronti 10/21/21

NEWS ALL DAY AT 4:30 P.M.

# ANCHORAGE DAILY NEWS

THURSDAY, SEPTEMBER 9, 2021

ALASKA'S NEWSPAPER | WINNER OF THE PULITZER PRIZE FOR PUBLIC SERVICE - 1976, 1989, 2020

\$2.00

## ALASKA CORONAVIRUS

### State reports new record for hospitalizations

6 deaths and 841 new COVID-19 cases announced Wednesday as hospitalizations swell to 197.

Zaz Hollander and Annie Berman  
Anchorage Daily News

Alaska reported six more deaths in people with COVID-19 on Wednesday, over 800 new cases of the virus, and yet another record for the number of COVID-positive people sick enough to need hospital care. The highly infectious delta variant driving up cases around the country is behind Alaska's ongoing surge that's overwhelming everything from COVID-19 testing and contact tracing to hospitals where some

providers say they've operated at unsustainable levels for weeks.

The number of people hospitalized with the coronavirus rose to 197 as of Tuesday, or more than 21% of total patients, the state reported Wednesday. That's up from 186 reported Tuesday following an increase of 12% over the Labor Day weekend.

The deaths involved two Anchorage women in their 70s, an Anchorage man in his 70s, an Eagle River man in his 60s, a Kenai woman in her 70s, and an out-of-state man in his 70s.

The state also reported another 841 new cases of the virus, 808 in Alaskans and 33 in nonresidents, according to the Alaska

Department of Health and Social Services dashboard. That's the third-highest single-day tally since the pandemic began in March 2020. The second-highest was set Friday with 818. The state reported 906 cases in early December.

With vaccines available, Alaska doctors say they never thought they'd see the current levels of transmission and disease filling beds throughout the state.

"Right now, our hospitals are stretched incredibly thin," Dr. Anne Zink, the state's chief medical officer, said during a briefing Wednesday.

Alaska Regional Hospital on Wednesday became the latest in a growing list of facilities around the state to sharply

restrict visitors over COVID-19 concerns,

according to a hospital spokesperson. The hospital is pausing all visitation except for several specific exemptions: children under 18 can have one caregiver with them; women in labor can have one partner; and families can visit patients who are dying. Providence Alaska Medical Center announced a return to a similarly strict visitor policy late last week.

Statewide, more than 21% of ER visits were COVID-related, as reported Wednesday. COVID-positive people made up nearly half the patients at UAF-Su Regional Medical Center on Monday, about a third

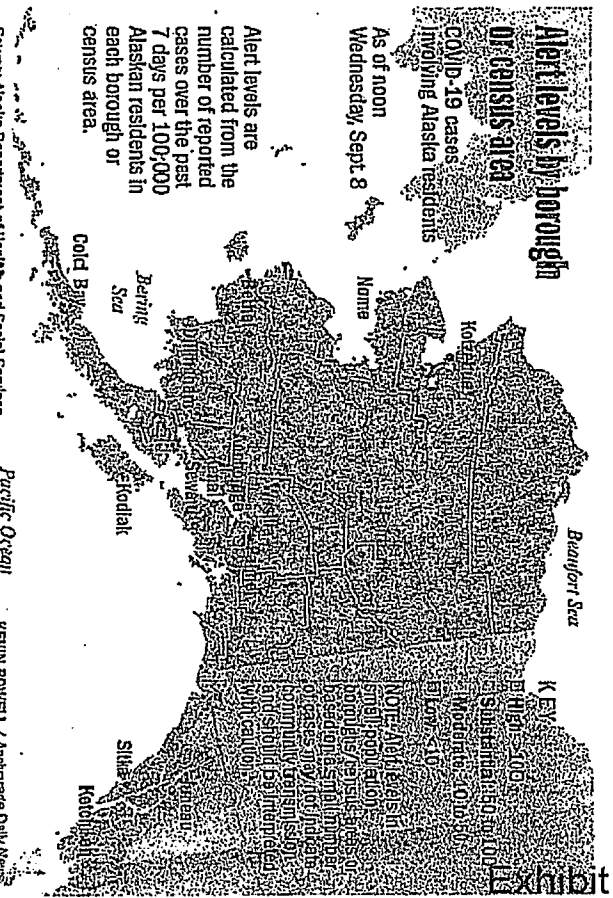
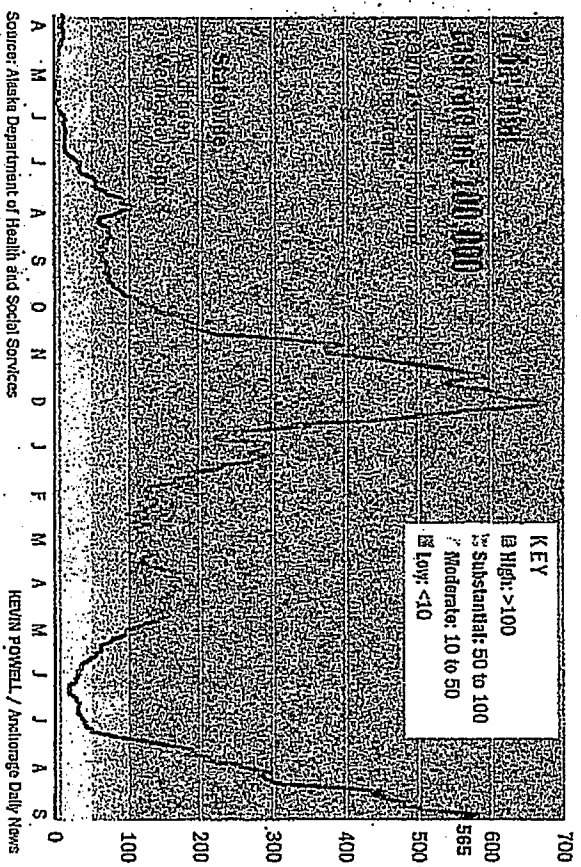
See CORONAVIRUS, A4

### SALMON CLIMBS THE LADDER TO SUCCESS IN SITKA



## ANCHORAGE CORONAVIRUS

As hospitals fill, mayor defends no mask



FROM PAGE A1

# CORONAVIRUS

of those at Fairbanks Memorial Hospital on Tuesday and about a third at Soldotna's Central Peninsula Hospital on Wednesday. Alaska's hospital statistics don't include long-term COVID-19 patients who no longer test positive but continue to need care, hospital officials said this week, so they underestimate the true impact of the virus on capacity. COVID-positive patients tend to stay longer than others once admitted — an average of three weeks at Mat-Su.

In North Idaho this week, an overwhelming surge in hospitalizations plus severe staff shortages forced hospitals there to enact crisis standards of care. Such guidelines, considered a worst-case scenario, help hospitals make difficult decisions including rationing care.

State officials and hospital administrators here say they are watching the situation closely for signs of deteriorating re-

Alaska were vaccinated, according to the Alaska State Hospital and Nursing Home Association. Of 38 COVID-19 patients in the ICU, five were vaccinated. Out of 18 on ventilators, one was vaccinated.

Unvaccinated COVID-19 patients in Alaska hospitals are far younger than those who are vaccinated, and exhibit fewer underlying health conditions yet get seriously ill from the virus, officials say.

At one Anchorage hospital, the median unvaccinated age was 44, while for vaccinated patients it was 66, Zink said. Younger, unvaccinated people sickened with COVID-19 are also waiting longer to seek hospital care.

"So it's really becoming this tale of two worlds," she said.

Still, the state's vaccination rates are slowing. Alaska last week saw a 21% increase in vaccinations compared to a month ago, down from a 46% increase the week before, according to state data.

A state health department survey in June and July found that only 15% of just over 900 unvaccinated respondents said

## Alaska residents vaccinations (12+)

With one dose: 372,740 | Change from previous update: +505

Fully vaccinated: 339,732 | Change from previous update: +801

61.8%

### By borough or census area

	% one dose vaccinated	% fully vaccinated	% one dose vaccinated	% fully vaccinated
Alutians East Borough	88	83	44	39
Alutians West Census Area	74	62	84	84
Anchorage Municipality	65	58	40	41
Barrow Census Area	78	72	67	63
Bristol Bay plus Aleutian Peninsula	91	78	68	65
Denali Borough	71	63	69	63
Diillingham Census Area	64	53	83	80
Fairbanks North Star Borough	53	49	87	88
Haines Borough	73	72	36	32
Juneau City and Borough	84	79	65	62
Kodiak Peninsula Borough	51	47	65	63
Ketchikan Gateway Borough	70	65	79	77
Matanuska-Susitna Borough	74	66	82	78
Matanuska Census Area				
Nome Census Area				
North Slope Borough				
Northwest Arctic Borough				
Petersburg Borough				
Prince of Wales-Hyder Census Area				
Sitka City and Borough				
Skagway Municipality				
Southeast Fairbanks Census Area				
Valdez-Cordova Census Area				
Wainwright City and Borough				
Yakutat plus Hoonah-Angoon				
Yukon-Charley Census Area				



there to enact crisis standards of care. Such guidelines, considered a worst-case scenario, help hospitals make difficult decisions including rationing care.

State officials and hospital administrators here say they are watching the situation closely for signs of deteriorating resources in the state, including staff levels and bed and ventilator availability.

Health officials say COVID-19 is "everywhere," moving through families, schools and businesses as well as big events like the Alaska State Fair or concerts. They encourage everyone to wear masks in indoor settings where transmission is high and get vaccinated.

Two villages in the Yukon-Kuskokwim Delta — Ekwonak and Kwethluk — announced lockdowns this week after multiple cases were reported in those communities. By Wednesday, at least 39 active cases had been reported in Kwethluk and seven in Ekwonak, according to a spokeswoman with the Yukon-Kuskokwim Health Corporation.

Unvaccinated people account for most of the surging hospitalizations that are taxing health-care systems in Alaska, data shows. Vaccinated people are getting infected, albeit at lower rates; they generally avoid more serious illness compared to unvaccinated people.

Nationally, unvaccinated people are about 17 times more likely to get hospitalized than vaccinated people, Zink said. And once hospitalized, vaccines tend to protect people from more severe effects. In one week in late August, 26 out of 136 COVID-positive people hospitalized in

Still, the state's vaccination rates are slowing. Alaska last week saw a 21% increase in vaccinations compared to a month ago, down from a 46% increase the week before, according to state data.

A state health department survey in June and July found that only 15% of just over 900 unvaccinated respondents said they definitely or probably planned to get the shot. Another 42% answered "definitely not" and were more likely to see themselves at no risk of severe illness from COVID-19.

Last winter when COVID-19 vaccinations first became available, Alaska led the nation in shots administered per capita. Much of that early success was attributed to a strong tribal health presence in many rural communities, plus high interest by healthcare workers and older Alaskans and who were particularly vulnerable.

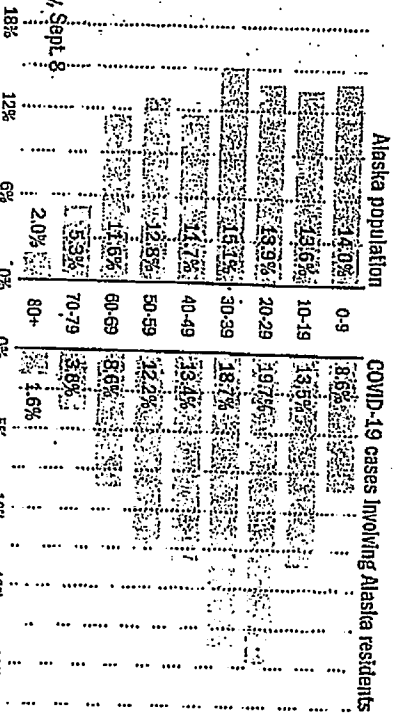
By summer, the state had fallen behind. As of Wednesday Alaska ranked 33rd among states for per capita vaccination rates. About 61% of eligible Alaskans had gotten at least one dose of vaccine and 55.8% were fully vaccinated.

People continue to report long testing lines, officials say. Contact tracing efforts are also so backed up that some COVID-positive people might never get a call at all.

The state's seven-day average test positivity rate — positive tests out of total performed — was 8.17%. Health officials say anything over 5% indicates the need for more testing.

Contact Zee Hollander at zhollander@adn.com.

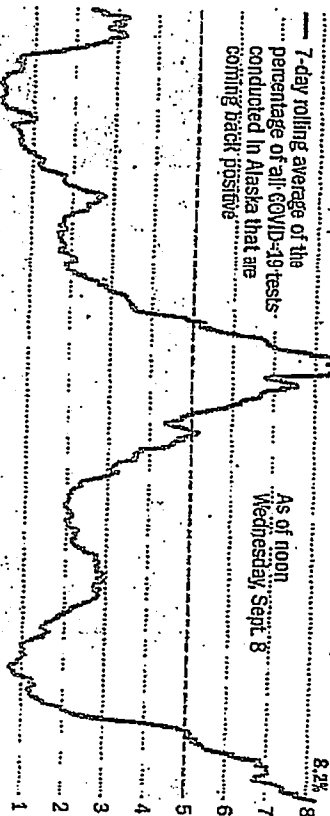
## By age group



As of noon Wednesday, Sept. 8.

Source: Alaska Department of Health and Social Services

## Positivity rate in Alaska



Denali Borough	71	63	Prince Of Wales-Iditarod Census Area	69	63
Dillingham Census Area	64	53	Sitka City and Borough	83	80
Fairbanks North Star Borough	53	49	Sheepway Municipality	87	88
Haines Borough	73	72	Southeast Fairbanks Census Area	36	32
Juneau City and Borough	84	79	Valdez-Cordova Census Area	65	62
Ketchikan Gateway Borough	51	47	Wrangell City and Borough	65	63
Kodiak Island Borough	70	65	Yakutat plus Hoonah-Angoon	79	77
Kuskokwim Census Area	82	76	Yukon-Koyukuk Census Area	82	78

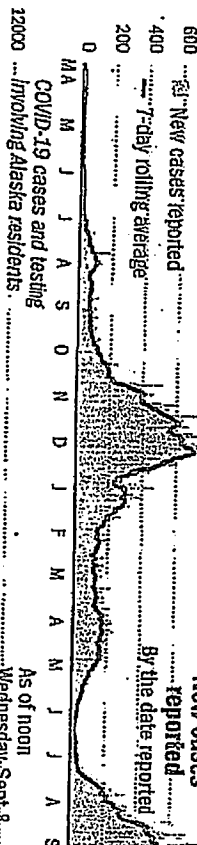
\* State data, does not include DOD or VA

KEVIN POWELL / Anchorage Daily News

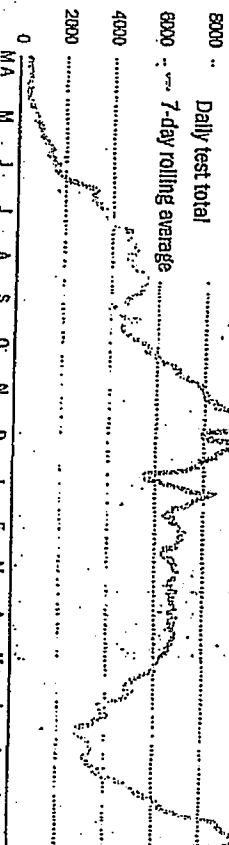
The positivity rate is the percentage of all coronavirus tests performed daily that are actually positive based on a 7-day rolling average. (7-day rolling average of positive tests daily) / (7-day rolling average of total tests daily) x 100%. State health officials consider positivity rate the best measure of whether testing capacity can keep up with current cases. The World Health Organization recommends positivity stay below 5%. Given the Alaska's robust testing program and isolated health-care systems, officials here say they long to keep the level below 2%.

Source: Alaska Department of Health and Social Services

## 7-day rolling averages



## Daily tests



Note: The seven-day average is the average of a day plus the previous six days of data.

Source: Alaska Department of Health and Social Services

KEVIN POWELL / Anchorage Daily News

# ANCHORAGE DAILY NEWS

SUNDAY, SEPTEMBER 12, 2021

ALASKA'S NEWSPAPER | WINNER OF THE PULITZER PRIZE FOR PUBLIC SERVICE — 1976, 1989, 2020

\$2.00

ALASKA CORONAVIRUS

## Rural hospitals struggle to transfer patients as COVID-19 hospitalizations hit new high

Even non-COVID patients can't always find a bed because hospitals are pushing maximum capacity.

### Total beds in Alaska occupied by confirmed COVID-19 cases

Currently: 208	As of noon Friday, Sept. 10	200
.....	.....	150
.....	.....	100
.....	.....	50
.....	.....	0
2020	2021	
A M J J A S O N D J F M A M J J A S		

Zaz Hollander  
Anchorage Daily News

Source: Alaska Department of Health and Social Services

KEVIN POWELL / Anchorage Daily News

Alaska's largest urban hospitals are so crowded with COVID-19 patients that some smaller, outlying facilities are struggling to transfer seriously ill people or scrambling to care for them in place.

Surging COVID-19 cases around the state continued this week with no sign of hitting a peak as the highly infectious delta variant continues to drive new cases and hospitalizations. Hospitals, especially in Anchorage and Mat-Su, describe a crisis-level

crush of staffing shortages and complicated coronavirus patient cases. The state on Friday reported two more deaths of people with the virus — an Anchorage woman

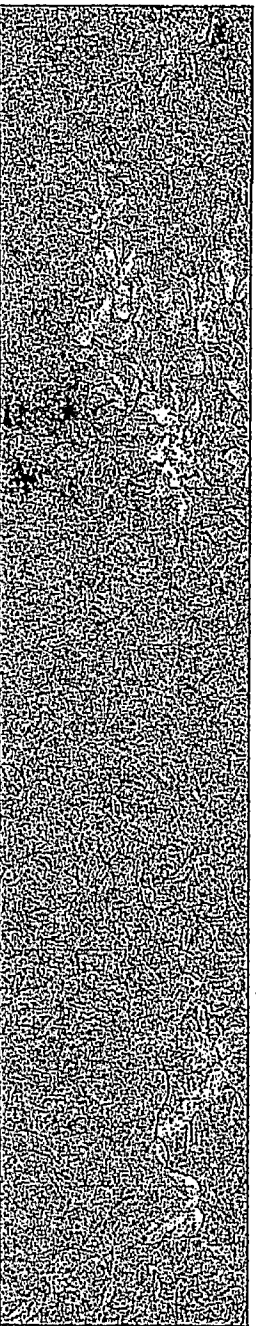
in her 40s and a Dillingham-area man in his 70s — and hit another new record for COVID-19 hospitalizations, according to the Alaska Department of Health and Social Services dashboard. A total of

444 Alaskans have died with the virus, as well as 14 people from out of state.

Hospitals such as those in Kodiak, Nome and Bethel are encountering unprecedented challenges as coronavirus-related capacity problems down the line ripple into a domino effect of stalled transfer requests.

Nome's hospital doesn't even have any COVID-19 patients, but it still faces "a COVID problem," as Dr. Tim Lemaire, a family practitioner and member of the Norton Sound Health Corp. incident

See HOSPITALS, A4



NATION/WORLD

## Don't focus on hate:

WTF N N

command team, put it. "We can't have COVID here but we can't get our regular patients ... care because of COVID everywhere else."

Trying to move patients with heart attacks, strokes or injuries from four-wheel accidents, Norton Sound Regional Hospital spokeswoman has to call three or four facilities to find an open bed at least once moving a patient all the way to Seattle to get them into an ICU.

Lemaitre participates in new statewide daily morning call that health officials post, Friday's call was not encouraging, especially the news from Anchorage, full intensive-care units, with COVID-positive patients half the beds; surgery recovery areas used for COVID patients; patients added in the ER because regular beds were full.

"Man, it's bleak," he said. In Kodiak, hospital officials during a briefing Thursday said they initiated "surge" plans for all patient types in response to continued transfer delays for non-COVID patients and the possible inability to do any transfers in the future. Typically, that can mean bracing to handle complex patients who can't be care elsewhere.

Bethel's Yukon-Kuskokwim Delta Regional Hospital has some COVID-19 patients, but providers generally care for them in use, Yukon-Kuskokwim Health Corp. chief of staff Dr. Len Hodges said Friday. It's the others — cardiac patients, car wreck victims, people with potentially fa-

### Alert levels by borough of census area

COVID-19 cases involving Alaska residents  
As of noon Friday, Sept. 10

Alert levels are calculated from the number of reported cases over the past 7 days per 100,000 Alaskan residents in each borough or census area.

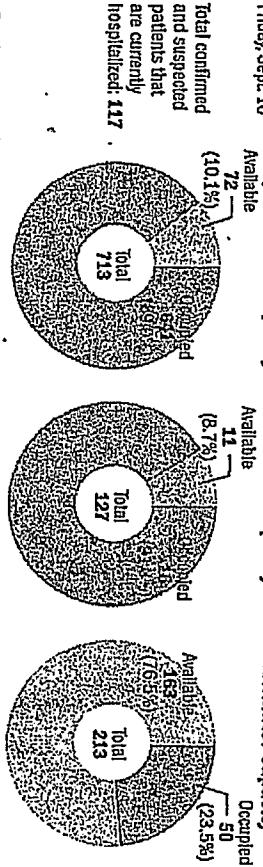
Source: Alaska Department of Health and Social Services

KEVIN POWELL / Anchorage Daily News

### Status of hospital resources in Anchorage\*

Occupied out of total capacity, includes COVID and non-COVID patients.

As of noon Friday, Sept. 10



\* Based on most recently completed survey of Alaska health facilities, updated as of the previous day. Not all facilities may report results each day. In which case the results from the last completed survey are used. Includes Critical Access Hospitals (CAH) and General Medical Bed counts can be calculated by subtracting Inpatient and ICU Bed counts.

KEVIN POWELL / Anchorage Daily News

them to go if they get seriously injured.

The only thing that will reduce the pressure on the system is for case counts to go down, Hodges said.

"It feels like there's this world inside the hospital and those of us who work in health care of desperation and helplessness," she said. "And then there's another world out there of people who maybe don't understand or realize how dire the situation is."

unvaccinated, according to hospital data. A state report in July found unvaccinated Alaskans were 7½ times as likely to be hospitalized as vaccinated people.

The state also reported 702 new cases on Friday, 677 of them residents. Officials have said a backlog in reporting means it's likely there are more cases than those reported daily.

Alaska in March became the most vaccinated state in the country, thanks to an aggressive tribal health campaign and heavy interest from seniors. But now the state's vaccination rates have slowed. The Alaska Chamber and state health department last week launched a vaccination sweepstakes to run through October in hopes of increasing rates.

As of Friday, 61.6% of eligible Alaskans had received at least one dose and 56.1% were considered fully vaccinated.

President Joe Biden's announcement Thursday calling for coronavirus vaccines or rigorous testing for larger businesses as a way to control the pandemic met with immediate criticism from Alaska Gov. Mike Dunleavy and Anchorage Mayor Dave Bronson.

On Friday, Dunleavy criticized the Biden plan but said the vaccine is the most effective way to fight the pandemic.

"It is clear from the data and empirical evidence over the last year that the vaccine is the most effective way to fight Covid-19," Dunleavy said in a written statement. "From what we are seeing in our hospitals, the very ill are mostly those who are unvaccinated. As governor, and as someone

been vaccinated, I will continue to recommend that Alaskans speak to their healthcare providers and discuss the merits of the vaccine based on their individual healthcare needs.

"With that said, President Biden's attempt to force vaccinations is ill conceived, divisive, and un-American. At a time in which we are called to work together, forced medical procedures run counter to our collective sense of fairness and liberty. My administration is aggressively identifying every tool at our disposal to protect the inherent individual rights of all Alaskans."

The state's seven-day average test positivity rate — positive tests out of total performed — was 8.98%, a near all-time high. Health officials say anything over 5% indicates the need for more testing.

State health officials this week said they're talking with providers in other states, including North Dakota, where officials recently issued crisis standards of care to help ration care amid scarce resources.

The fact that those conversations are even happening is shocking, said Jared Kossin, president and CEO of the Alaska State Hospital and Nursing Home Association.

"That should never be discussed in our lifetime, absent for mass casualty events over a short period of time," Kossin said Friday. "The fact we are contemplating integrating that into our care response is unfathomable. I hope people realize that."

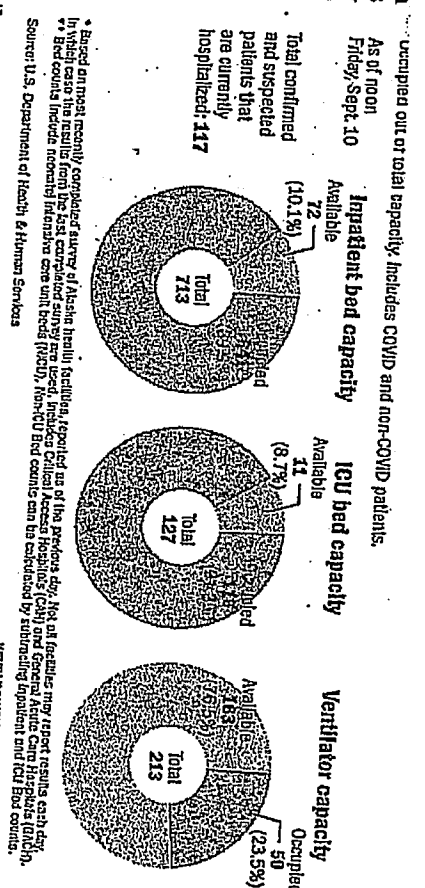
Reporter Morgan Harkov contributed to this story.

intensive-care units, with COVID-positive patients in half the beds; surgery recovery areas used for COVID patients; patients held in the ER because regular beds were full.

"Man, it's bleak," he said. In Kodiak, hospital officials during a briefing Thursday said they initiated "surge" plans for all patient types in response to limited transfer delays from non-COVID patients to the possible inability to do any transfers in the future. Typically, that can mean bracing to handle patients who can't be elsewhere.

Bellevue's Yukon-Kuskokwim Delta Regional Hospital has some COVID-19 patients, but providers generally care for them in the Yukon-Kuskokwim Health Corp. chief of staff Dr. nHodges said Friday. Is the others — cardiac and, car wreck victims, and with potentially fatal cases — who are hard to transfer, Hodges said. The past few weeks, it's 112 hours, at most 24, and ICU beds for people need of critical care use the health organization's referral hospital, the Medical Center, usually full.

As of noon Friday, Sept. 10, Total confirmed and suspected patients that are currently hospitalized: 117



\*Based on most recently completed survey of Alaska health facilities, reported on at the previous day. Not all facilities may report results each day. Inpatient cases include patients from the last seven days. ICU cases include patients from the last seven days. Ventilator cases include patients from the last seven days. Total counts may not add due to rounding. Source: U.S. Department of Health & Human Services

them to go if they get seriously injured. The only thing that will reduce the pressure on the system is for case counts to go down, Hodges said.

"It feels like there's this world inside the hospital and those of us who work in health care of desperate, another world out there of people who maybe don't understand or realize how dire the situation is."

State officials say rural hospitals throughout the state are suddenly facing unheard-of medical situations because they're holding patients they've never had to before. Brian Ritchie, the state's manager of health emergency response operations, helped a rural hospital find oxygen supplies after COVID-positive patients on high-flow therapy ran through existing cylinders

faster than expected. "It's a challenge for these small rural communities that have never had to deal with this level of illness before, at this level," he said.

As of Thursday, there were 208 people hospitalized with the virus in Alaska, a meteoric rise of more than 1,200% since late June, when there were fewer than 20 COVID-positive patients. Hospitals say those numbers are likely an undercount of the true impact of COVID-19, since they don't include some long-term COVID-19 patients who no longer test positive but still need hospital care. There are also some hospitalizations involving vaccinated people, but hospitalized now are

those infections tend to be less severe, health officials say. Between January and early September, there were 17 deaths, 105 hospitalizations and 6,378 breakthrough cases among vaccinated Alaskans 12 and over, according to provisional state health data. That's out of a total of 131 deaths, 894 hospitalizations and 33,089 cases over the same time period.

Unlike the state's last COVID-19 wave, in which older people proved vulnerable, health care providers say they're seeing younger, generally healthy and largely unvaccinated people getting sick and dying. Most of the people hospitalized now are

unvaccinated. In hopes of increasing rates. As of Friday, 61.6% of eligible Alaskans had received at least one dose and 56.4% were considered fully vaccinated.

President Joe Biden's announcement Thursday calling for coronavirus vaccines or rigorous testing for larger businesses as a way to control the pandemic met with immediate criticism from Alaska Gov. Mike Dunleavy and Anchorage Mayor Dave Bronson.

On Friday, Dunleavy criticized the Biden plan but said the vaccine is the most effective way to fight the pandemic. "It's clear from the data and empirical evidence over the last year that the vaccine is the most effective way to fight Covid-19," Dunleavy said in a written statement. "From what we are seeing in our hospitals, the very ill are mostly those who are unvaccinated. As governor, and as someone who had Covid and has

Reporter Morgan Kalkoff contributed to this story.

near all-time high. Health officials say anything over 5% indicates the need for more testing. State health officials this week said they're talking with providers in other states, including North Idaho, where officials recently issued crisis standards of care to help ration care amid scarce resources. The fact that those conversations are even happening is shocking, said Jared Kohn, president and CEO of the Alaska State Hospital and Nursing Home Association. "That should never be discussed in our lifetime, absent for mass casualty events over a short period of time," Kohn said Friday. "The fact we are contemplating integrating that into our care response is unfathomable. I hope people realize that."

Reporter Morgan Kalkoff contributed to this story.

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...the same thing and getting paid for it," she said.)

She is one of the state's top trail and mountain runners, and in recent weeks she fashioned back-to-back triumphs.

She set a course record in the Resurrection Pass 50-mile race on the Kenai Peninsula on July 31 and four weeks later ran the eighth-fastest

from a 2011 tear suffered five months earlier — she placed sixth.

Inokuma could fill a scrapbook with press clippings from the last couple of years. In 2020, she won the Resurrection Pass 50-miler as a rookie and ran the eighth-fastest women's time in history at the Matanuska Peak Challenge. This summer, she

See INOKUMA, A16



EMILY MESNER / ADN

Meg Inokuma set a course record in the Resurrection Pass 50-mile race July 31 and four weeks later ran the eighth-fastest women's time in the history of the 15.75-mile Lost Lake Run near Seward.

## VI BREWS OVER TURNAGAIN ARM



BILL ROTH / ADN

of Scottsdale, Ariz., watch wind-driven waves crash on the rocks at Beluga Point along Turnagain Arm on the Anchorage area.

## ies across the state have ns to federal vaccine mandate

Administration. The agency is developing the new rules, according to a White House statement on Thursday.

As many as 100 million workers will be impacted nationally, including many in Alaska. Companies that don't comply with the directive could be hit with large penalties, according to news articles. The directive is part of a sweeping new order from the Biden administration that will also require vaccinations for executive branch employees and federal contractors, adding millions more workers.

Some Alaska employers and union leaders said the proposal will help combat a labor shortage by slowing the spread of the virus and easing concerns about



State House rejects vote on Nuremberg code, a topic cited by COVID-19 vaccine skeptics. A3

safety at work.

But some employers believe the requirements could cost them workers.

Jim Jansen, chairman of Lynden, a large transportation and logistics company, said the mandate oversteps personal liberties.

"We at Lynden will oppose this aggressively, taking legal action if necessary,"

See VACCINE MANDATE, A16

## ALASKA CORONAVIRUS

# Hospital numbers, at all-time high, don't tell the whole story

With multiple reporting methods in use, pinning down the true burden on health care facilities is difficult.

Morgan Krakow  
Anchorage Daily News

As Alaska's hospitals grapple with short staffing, limited capacity and a health care system under serious strain, the state has reported ever-rising record numbers for COVID-19 hospitalizations.

But those tallies are complicated. They include people who may have been admitted for something else and test positive for the virus, but they also omit others who have been hospitalized for COVID-19 for so long that they're not infectious anymore.

That all makes it harder to discern the true burden placed on health care facilities using a single number, Dr. Anne Zink, Alaska's chief medical officer, said in an interview Friday.

"I don't think from a state perspective we can say it's like really overcounting, we can't really say it's undercounting," Zink said. "We can say this is the only data that we can report out because it's the only data that we have."

State hospitalization data also doesn't include emergency room visits, another way to quantify the burden on hospitals, since those are considered outpatient visits, Zink said.

The virus hospitalizations number recorded on the state's online dashboard comes from hospitals that report into a federal database, and that information is then extracted by state public health officials.

Exhibit 1

ADN  
9/13/21



FROM PAGE A1

## HOSPITALIZATIONS

While testifying before the House Health and Social Services Committee last week, Zink told legislators that the total number of hospitalizations reported on the state's COVID-19 dashboard likely didn't represent everyone ill from the virus in Alaska's hospitals.

"For someone, say, who's in their 30s who gets hospitalized, they might be infectious for the first 10, 15 days," Zink said. "But they might require a monthlong or two-month-long hospital stay. And so that is a continued burden on the hospital that is not reflected in the overall dashboard numbers."

There may also be other patients who aren't reflected in the dashboard, Zink said. Some patients might begin to recover and then experience a complication, like a heart attack or stroke, and are admitted and treated instead for that complication, according to Zink. That wouldn't always show up in state data.

When asymptomatic individuals who are COVID-positive are admitted to hospitals for other reasons, like labor, those patients still incur more work for hospital staff and require more resources. Staff have to gown up and patients need single rooms.

Asymptomatic patients also might get sicker while in the hospital, Zink said, and go from seeing no symptoms when they test positive to experiencing complications later.

Generally speaking, health officials say, once a patient is no longer positive for COVID-19, they're no longer counted in the overall hospitalizations number. They might, however, still be in a hospital bed while symptoms persist, needing acute care and impacting capacity.

But there is some variety in how COVID-19 hospitalizations get reported.

Based on responses from various Alaska hospitals this week, some report all COVID-19-related hospitalizations while others only report active cases.

Alaska's largest hospital, Providence Alaska Medical Center, only reports active COVID-19 cases in their hospitalization numbers. That doesn't include others who are no longer infectious with the illness

but still need hospital care, according to Providence Alaska spokesman Mikal Canfield.

On Wednesday, 50 people were considered active COVID-19 patients at Providence, while 22 others were not included in the case count since they weren't infectious and were considered "recovered," Canfield wrote in an email.

"This does not necessarily indicate the patients are doing well, it just indicates these patients are no longer considered infectious," he wrote.

Similarly, Fairbanks Memorial Hospital only reports active COVID-19 cases, which as of this week was 24 cases, while there were no patients who were hospitalized past their infectious period.

The COVID-19 hospitalizations number of the state's dashboard isn't necessarily an accurate portrayal of who may be hospitalized with the illness at Mat-Su Regional Hospital either, according to spokesman Alan Craft. That's because, similar to other facilities, patients who are at the hospital for longer stays due to COVID-19 may not show up in those numbers after being reclassified.

At Alaska Native Medical Center, generally any patient that tests positive for COVID-19 is reported as hospitalization but may be pulled out of that tally based on symptoms and other. Centers for Disease Control and Prevention guidelines even though they may still be hospitalized, said Dr. Robert Onders, of the Alaska Native Tribal Health Consortium.

However, at Alaska Regional in Anchorage, spokeswoman Kjerstin Lastufka said that their COVID-positive numbers include all patients who need care related to the virus until discharge.

"The number that is reported to the state includes both patients in the acute phase of COVID-19 care as well as patients still recovering from COVID-19 — those who are past the infectious period — but are still hospitalized," Lastufka said in an email.

Officials at Bartlett Regional Hospital in Juneau said that they report new COVID-19 admissions within their infectious window and in some cases, depending how severe a case might be when they're admitted, that infectious window can be extended to 20 days.

Contact Morgan Krakow at [mkrakow@adn.com](mailto:mkrakow@adn.com).

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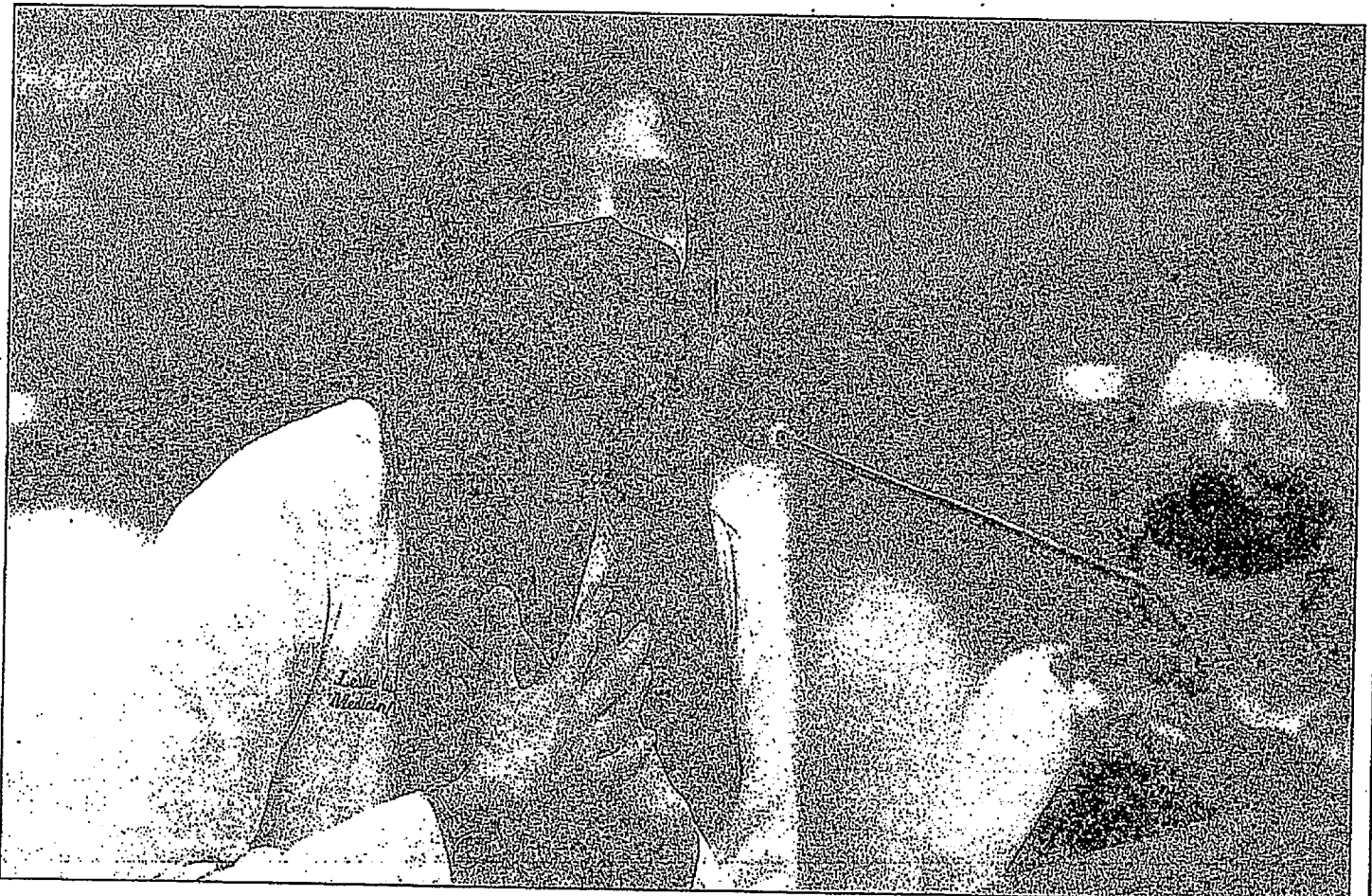
# ANCHORAGE DAILY NEWS

WEDNESDAY, SEPTEMBER 15, 2021

ALASKA'S NEWSPAPER | WINNER OF THE PULITZER PRIZE FOR PUBLIC SERVICE — 1976, 1989, 2020

ALASKA CORONAVIRUS

## State's largest hospital rationing care under crisis standards



Dr. Leslie Gonsetto, an internal medicine hospitalist at Providence Alaska Medical Center, testifies during the Anchorage Assembly meeting on Tuesday. Donna Méars, vice chair of Anchorage's Health and Human Services Commission, is at right. Photos by BILL ROTH / ADN

*More than 30% of adults hospitalized at Providence are COVID-positive*

Zaz Hollander  
Anchorage Daily News

Alaska's largest hospital is now implementing crisis stan-



INSIDE  
Exhibit 1

Gov. Mike Dunleavy urges vaccinations



Gonssette, an internal medicine hospitalist at Providence Alaska Medical Center, testifies during the Anchorage Assembly meeting on Tuesday. Donna Mears, vice anchorage's Health and Human Services Commission, is at right.

Photos by BILL ROTH / ADN

## More than 30% of adults hospitalized at Providence are COVID-positive

Anchor  
Daily News

Alaska's largest hospital is implementing crisis standards of care and rationing medical services due to a crush of COVID-19 cases and staff shortages that mean providers are prioritizing patients most likely to recover.

Providence Alaska Medical Center's chief of staff announced the decision in a two-page letter that urges Alaskans to get tested, vaccinated if eligible and avoid potentially dangerous activities or situations that could lead to hospitalization.

More than 30% of the adults hospitalized at Providence were COVID-positive as of Tuesday, with the virus demand exceeding the consuming care than the hospital's capacity, providers say.



Providence Alaska Medical Center staff stand in support during public testimony at the Anchorage Assembly meeting on Tuesday.

"The acuity and number of patients now exceeds our resources and our ability to staff beds with skilled caregivers, like nurses and respiratory therapists,"

states the letter, signed by Providence chief of staff Dr. Kristen Solana Walkinshaw on behalf of the hospital's medical executive committee; more than 1,000

### INSIDE

- Gov. Mike Dunleavy urges vaccinations as hospitalizations remain high; state reports 7 additional deaths. A2
- Fauci warns of possible new COVID-19 variant without mass vaccination. A18

doctors, nurse practitioners and physician assistants. "We have been forced within our hospital to implement crisis standards of care."

The policy was enacted over the weekend.

Hospitals around the state report operating at or near capacity, with very limited options for transferring patients to Seattle or other Lower 48 hospitals that usually provide care for patients from Alaska.

Gov. Mike Dunleavy on

See PROVIDENCE, A17

### AL CORONAVIRUS

## COVID-19 cases climbing, wiping out months of progress

Averaging over 1,800 deaths and 70,000 new cases per day, the highest levels respectively, in early March and late January.

Hollingsworth, Cathy Bussewitz  
Long Press

COVID-19 deaths and cases in the U.S. rebounded back to levels not seen since

The cases — driven by the delta variant combined with resistance among some Americans to getting the vaccine — are concentrated mostly in the South.

While one-time hot spots like Florida and Louisiana are improving, infection rates are soaring in Kentucky, Georgia and Tennessee, fueled by children now back in school, loose mask restrictions and low vaccination levels.

The dire situation in some hospitals is starting to sound like January's infection

units at or over capacity in Texas.

The deteriorating picture nine months into the nation's vaccination drive has angered and frustrated medical professionals who see the heartbreak as preventable. The vast majority of the dead and the hospitalized have been unvaccinated, in what has proved to be a hard lesson for some families.

"The problem now is we have been trying to educate based on science, but the most of the education that is happening

— 66 of 96 — are repeat shortages, the highest pandemic, the government. "Our hospitals are in a lapse in many communities. Stack, Kentucky's missioner.

The U.S. is averaging COVID-19 deaths and cases per day, the highest since early March and both figures have been



FROM PAGE A1

## PROVIDENCE

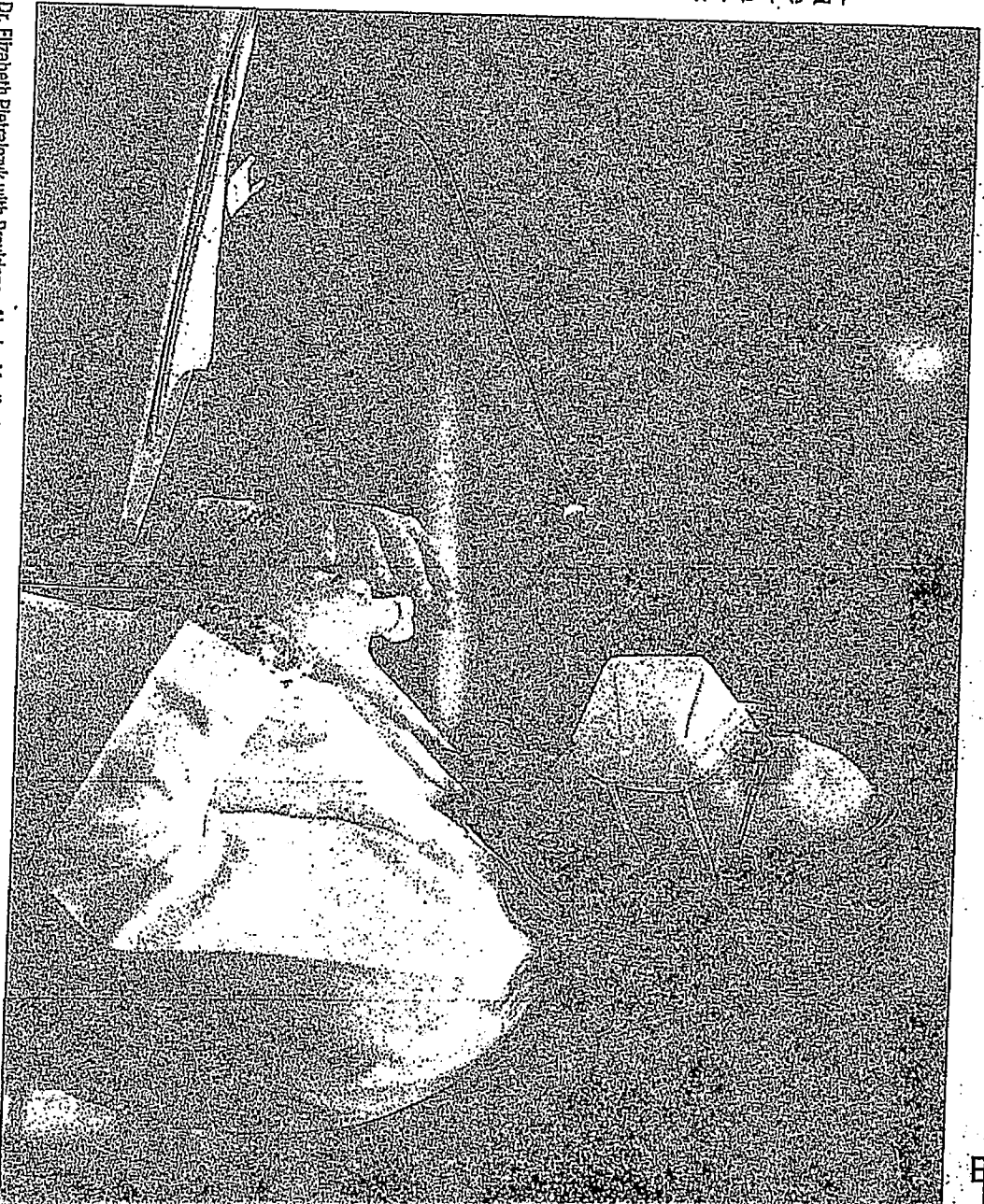
Thursday urged more Alaskans to get vaccinated against COVID-19 as the highly infectious delta variant continues to drive a meteoric wave of new cases and hospitalizations at some of the highest levels in the country. The state on Tuesday reported seven more deaths linked to the virus, near-record hospitalizations and nearly 700 new cases.

"We're out of beds. Life saving measures are not going to be possible in every case," said Dr. Leslie Gonselle, an internal medicine hospitalist and member of Providence's executive committee board who helped draft the letter. "And that's what we're trying to emphasize."

Last year, Anchorage enacted strict COVID-19 mitigation measures including mandatory masking and capacity restrictions under prior administrations. Anchorage Mayor Dave Bronson has made it clear he opposes such requirements.

### 'We are in a crisis at the hospital'

At least 30 health care workers, including Solana Walkishaw and Gonselle, attended the Anchorage assembly meeting Tuesday



Dr. Elizabeth Pietralczyk with Providence Alaska Medical Center testifies during the Anchorage Assembly meeting on Tuesday. "I worry that I'll be unable to provide care and I'll have to watch them die due to a lack of resources. I have only had to worry about that one other time during remote deployments. I never imagined to experience that helplessness here at home," Pietralczyk said. "I have always served my country and my community for my entire adult life. Now I need your help."

patients waiting in their sadly many cars for hours and hours now that

Exhibit 1

At least 80 health care workers, including Solana Walkinshaw and Gonselle, attended the Anchorage assembly meeting Tuesday evening. They were praised by some Assembly members and grilled by others. They were occasionally interrupted by murmurs of disagreement and discontent from others in the crowd.

Bronson praised the municipality's work on testing and monoclonal antibody treatment sites and reiterated his opposition to any vaccine requirements as the meeting got underway. Several people testified in opposition to vaccination and other mitigation policies. At least one suggested the virus was nothing to be afraid of.

"We are in a crisis at the hospital," Solana Walkinshaw testified, meaning care had to be rationed. "That means when we have four patients and two machines, two people are not getting that care. It's happening now."

Gonselle said as she walked into the meeting, she was trying to find an intensive-care bed for a patient in critical condition.

"My patient is going to probably die. I need an ICU bed," she told doctors on the ICU. "And the answer I got was, 'We are doing our best. We do not have a bed.' This is what is happening every day. But ... this person doesn't even have COVID. This person is vaccinated."

Hospitalist Dr. Ryan Webb called a nursing supervisor while waiting in line to testify after Assembly member Jamie Allard pressed for more

tents and I'll have to watch them die due to a lack of resources. I have only had to worry about what one unit is doing during temporary deployments. I never imagined what it would be to experience that helplessness here at home," Pietralczyk said. "I have always served my country and my community for my entire adult life. Now I need your help."



Providence Alaska Medical Center staff show their support during the Anchorage Assembly meeting.

information about how many Providence beds are staffed versus unstaffed.

Out of 223 adult beds at Providence, two are unstaffed and one more is temporarily out of service because of a leak, Webb said. The rest are staffed. The hospital as of Tuesday evening had 10 people waiting in the emergency room for a bed, including three waiting for an ICU bed — with none available, he said.

"I would just briefly respond to this suggestion that we should not be afraid," he said. "I would say that we are terrified as physicians and nurses. What we're terrified of is being faced with two or three or four patients, and not having the resources that we need to take care of them."

Dr.

Elizabeth

"I worry that I'll be unable to properly care for my patients and I'll have to watch them die due to a lack of resources. I have only had to worry about that one other time during redeployments. I never imagined that I would have to experience that helplessness here at home," Pietralczyk said. "I have always served my country

Pietralczyk, an Anchorage resident who practices family medicine and spent 18 years in the U.S. Air Force, testified with her voice shaking before beginning to cry. She listed her worries: contracting COVID-19 and leaving her children without a mother, bringing the virus home to her unvaccinated 6-year-old, not being able to get hospital care if a family member is hurt in an accident.

The Providence letter describes an emergency room overflowing with

and my community for my entire adult life. Now I need your help."

If people need specialty care at Providence — a cardiologist, trauma surgeon or neurosurgeon — "We

patients waiting in their cars for hours and heart attack patients sometimes denied timely life-saving care. Providence now often declines transfer requests from outlying rural hospitals trying to move accident or stroke victims and has instituted strict visitor restrictions.

Some elective procedures, a category that can include tumor removals or heart valve replacements, have been delayed for months and be continue to be postponed.

"People from around Alaska depend on Providence to provide medical care for people statewide. Unfortunately we are unable to continue to meet this need; we no longer have the staff, the space, or the beds," Solana Walkinshaw wrote.

Alaska Regional Medical Center is not in crisis-care mode, spokesperson Kjersti Lashutka said. But the hospital on Tuesday decided to modify the surgery schedule and "prioritize the most critical cases," Lashutka wrote in an email. "These plans may include rescheduling or postponing certain procedures based on the urgency of the procedure, the judgement of our physician partners, and the current circumstances

See PROVIDENCE, A18

The holiday season will be here soon, and the 2021 Holiday Bazaar Guide is the place to find local craft and gift fairs happening in and around Anchorage.

The guide will be published in print and online on Friday, Sept. 24, 2021.

The deadline to submit bazaar listings is Friday, Sept. 17, 2021, so don't miss your chance to be included in the



Dr. Kristen Solana Wolkstein, chief of staff at Providence Alaska Medical Center, reads a statement from the medical staff during the Anchorage Assembly meeting on Tuesday.

BILL ROTH / ADN

## FROM PAGE A17 PROVIDENCE

within our facility and community."

Dumleavy allowed the state's COVID-19 emergency declaration to expire in April and last week declined to declare another, instead submitting bills to restore lost telehealth options and streamline health-care worker background checks. The legislation died in the Alaska House after it lost support when a Sunday-night vote added an amendment that could have prevented hospitals from limiting patient visits.

Bronson last week said he will not ask residents to get vaccinated, issue a mask mandate or order other COVID-19 restrictions. Bronson also said hospital capacity issues weren't caused by COVID-19 patients but nurses leaving their jobs over vaccination requirements.

"Nurses here are not leaving because of the vaccine mandates. They're leaving

*Rationing care does not mean denying care for unvaccinated people, Gonsette said. Rather, it involves decisions based on where limited resources go and who benefits the most.*

because they're overwhelmed by the emotional toll it's taking," Gonsette, the Providence hospitalist, said in an interview Tuesday. "Part of it, we all feel it is because we are not heard. The public either wants to buy their head in the sand or maybe some of them really don't know what's going on. Those are the ones we're trying to reach."

The shift to crisis standards means the hospital must "prioritize scarce resources and treatments to those patients who have the potential to benefit most," the letter states. That means enacting policies and procedures to ration care and treatments including dialysis and specialized ventilatory support.

The hospital developed its crisis standards of care at the start of the pandemic in March 2020, according to Gonsette.

Last week, Providence stood up a triage ethics committee to help physicians facing "difficult decisions," she said. The executive committee board decided to issue the letter during an emergency meeting Sunday.

Rationing care does not mean denying care for unvaccinated people, Gonsette said. Rather, it involves decisions based on where limited resources go and who benefits the most.

Providence issued a statement Tuesday after the letter surfaced saying "the current demands on acute care in our hospital and in the state of Alaska are exceeding available capacity and are requiring difficult choices regarding allocation of specific life-sustaining treatments or resources and regarding patient transfers to higher levels of care. As a result

## ANCHORAGE

Read the Providence letter at [adn.com](http://adn.com).

of this situation, providers and health care facilities are currently experiencing limitations in their ability to provide the standard of care that we wish to provide to our community and normally expect to provide. This situation may persist for some time, which has required us to use processes developed to ensure the most equitable allocation of limited resources."

Idaho public health leaders announced last week that they activated crisis standards of care allowing health care rationing for the state's northern hospitals because there are more coronavirus patients than the institutions can handle.

State health officials last week said they were talking with hospitals about what resources they needed as well as other states, including Idaho.

Contact Zar Hollander  
at [zhollander@adn.com](mailto:zhollander@adn.com).

Dave Goldner  
New York Daily News

Dr. Anthony Fauci on Tuesday warned that COVID-19 could mutate into an even more virulent variant if the pandemic is not stamped out with mass vaccination.

The pandemic expert agreed with MSNBC's Mika Brzezinski when she suggested that a new "monster" strain could make the delta variant look like child's play.

"There's always a risk of, as you get more circulation of the virus in the community, that you'll get enough accumulation of new mutations to get a variant substantially different than the ones we're seeing now," Fauci said on the "Morning Joe" show.

Fauci said one of the most important reasons to get an overwhelming number of people vaccinated is to prevent the COVID-19 virus from mutating into new variants as it spreads.

"You're vaccinating now to prevent the next mutant coming, the next variant from coming," Fauci said.

He suggested that future variants might even be resistant to the vaccines that have so far proven very effective in protecting people against even the virulent delta variant.

"Then it would in many respects negate some of the very positive protection that you get from the vaccines," Fauci said.

Public health experts like Fauci have been dismayed by the significant resistance to the COVID-19 vaccines. Tens of millions of eligible Americans have so far refused to get the lifesaving shots, and a big chunk of them say they will not get inoculated.

After months of pleading with Americans to do the right thing, President Joe Biden last week announced an aggressive new policy of vaccine mandates to cajole anti-vaxxers to get their shots.

But Fauci warned that an even more dire result of a failure to get an overwhelming number of people vaccinated is that it allows the virus to continue to spread widely enough to create even nastier new strains.

"Viruses will not mutate if they don't have the opportunity to spread and replicate," he said. "So the more dynamics of viral activity you have in the community, the greater opportunity you give to the virus to mutate."

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# ANCHORAGE DAILY NEWS

WEDNESDAY, SEPTEMBER 22, 2021

ALASKA'S NEWSPAPER | WINNER OF THE PULITZER PRIZE FOR PUBLIC SERVICE — 1976, 1989, 2020

\$2.00

## ALASKA CORONAVIRUS

# State's COVID-19 case rate is now highest in nation

Rate of daily new infections over last week is more than double the national average.

Annie Berman  
Anchorage Daily News

With many hospitals still in crisis, Alaska is now recording the highest case rate per capita of any U.S. state after surpassing its winter-level peak for COVID-19 cases and hospitalizations.

According to a New York

Times tracker updated Tuesday, Alaska's average rate of daily new infections over the last week is more than double the national average — and higher than any state. The state on Tuesday reported 861 cases after recording more than 2,000 new cases in three days over the weekend.

While case counts and case rates don't account for how many of the people who test positive for COVID-19 are symptomatic or severely ill, rising case counts are

**ENDING**  
"Soul-crushing": U.S. COVID-19 deaths are topping 1,900 a day, AP

often followed weeks later by a similar uptick in hospitalizations and deaths.

The high volume of cases means the state is currently behind on data entry, which affects the ability to assess day-to-day trends, Dr. Joe McLaughlin,

Alaska's state epidemiologist, said in an interview Tuesday.

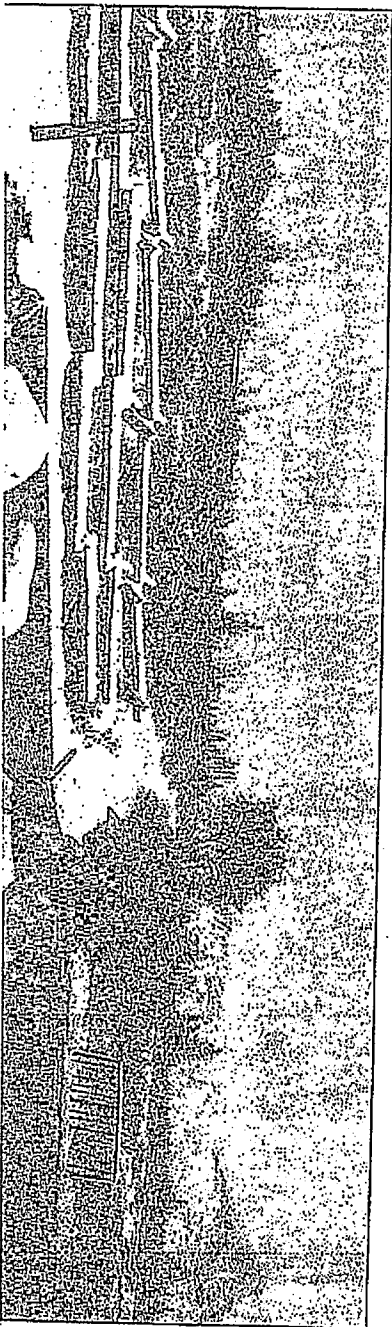
"That being said, regardless, we know that very high incidence rates are currently occurring across most of Alaska. And we'll just have to keep watching and hopefully we'll have a better sense for the trend in the next week or two," he said.

Alaska's continually high counts are a sign that the latest surge driven by the delta variant has not yet leveled off.

Alaska's hospitals continue to operate under what were once unimaginable circumstances. Last week, the state's largest hospital, Providence Alaska Medical Center in Anchorage, announced it was shifting to crisis standards of care and rationing treatment due to a combination of staffing shortages and COVID-19 cases that accounted for about a third of the hospital's patients.

See COVID-19, A18

## FIRST SNOWFALL OF THE SEASON



KOTZEBUE

# Man gets 99 years for sex abuse,





# COVID-19

Expanded graphics and more coronavirus coverage at [adn.com](http://adn.com).

which can partially explain why Alaska's death rate remains low compared to other states, McLaughlin said. About 25% of all deaths in the state from May through August of this year have not yet been registered, he said.

Hospital patients have since died as a direct result of limited resources and impossible choices doctors have had to make, hospital administrators said Monday. It's likely that Providence will remain in crisis mode for at least another two weeks, they said.

"Many states have more robust hospital capacity than we do in Alaska, and therefore, they might be less vulnerable to surges in COVID," McLaughlin said.

The number of COVID-positive patients hospitalized as of Monday evening dipped slightly to 196 after hitting a record of 210 earlier this month. Hospitals say those numbers are likely an undercount of the true impact of COVID-19, since they don't include some long-term COVID-19 patients who no longer test positive but still need hospital care.

Other hospitals in Anchorage and elsewhere are delaying nonurgent

surgeries and restricting visitors. Rural hospitals are struggling to transfer patients for higher-level care.

Alaska's COVID-19 death toll rose on Tuesday with the deaths of six Alaskans newly reported. In total, 465 residents and 15 nonresidents in the state have died with the virus since the start of the pandemic. Alaska's overall death rate from the virus remains among the lowest in the nation, but health officials have said national comparisons are complicated by the state's vulnerable health care system, and that deaths have been on the rise following increased case counts.

"Death tends to be a lagging indicator and can take as long as two to three or even four weeks behind cases," McLaughlin said.

Because of a summer cyberattack, Alaska's vital records section is backlogged

As of Tuesday, 62.5% of Alaskans had received at least one dose of vaccine and 67.5% were fully vaccinated. Alaska ranked 32nd in the country for vaccination rates per 100,000.

The statewide seven-day rolling average for test positivity — positive results out of total performed

— was 9.62% as of Tuesday. Health authorities say anything over 5% signals there's not enough testing occurring.

Contact Annie Benman at [aberman@adn.com](mailto:aberman@adn.com).

KEVIN POWELL / Anchorage Daily News

Total confirmed cases: 4,436 | Change from previous update: +26\* | Total deaths: 15  
Source: Alaska Department of Health and Social Services  
KEVIN POWELL / Anchorage Daily News

## NON-RESIDENTS

Community	Total cases	New cases	Deaths	Community	Total cases	New cases	Deaths
Admiral's East Borough	107	-	-	Juneau City and Borough	126	-	-
Admiral's West Census Area	258	+4	1	Kenai Peninsula Borough	2,516	+45	5
Unalaska	126	-	-	Nome	265	-	-
Anchorage Municipality	38,183	+321	223	North Slope Borough	691	-	-
Anchorage	38,183	+321	223	Pudlo Bay	1	-	-
Chugach	11,693	+21	3	Ugalek	1,348	+24	4
Eagle River	3,423	+46	10	Other	533	+19	-
Gitwog	212	-	-	Northwest Arctic Borough	366	+5	-
Bethel Census Area	1,887	+10	5	Kotzebue	603	+11	3
Bethel	1,887	+10	5	Petersburg Borough	194	-	2
Other	3,157	+15	18	Peterson	194	-	2
Bristol Bay plus Lake & Peninsula	185	+15	-	Prince of Wales-Hyder Census Area	130	-	3
Chitina Census Area	302	-	1	Other	211	+6	2
Cordova	328	+3	1	Malakof	75	-	3
Valdez	95	-	1	Other	974	+12	4
Copper River Census Area	403	-	-	Shagway Municipality	47	+1	-
Denali Borough	65	-	-	Shagway	47	+1	-
Healy	65	-	-	Southeast Fairbanks Census Area	529	+1	4
Dillingham Census Area	166	+4	1	Delta Junction	219	+5	1
Dillingham	166	+4	1	Other	151	+1	2
Other	320	+2	4	Unknown	18	-	-
Fairbanks North Star Borough	23	-	-	Wrangell City and Borough	120	-	-
Estes	8,108	+54	41	Wrangell	120	-	-
Fairbanks	8,108	+54	41	Wrangell plus Homer-Angoon	96	+2	2
North Pole	2,301	+15	6	Other	96	+2	2
Seldovia	95	-	1	Yukon-Koyukuk Census Area	510	+5	4
Other	329	-	-	Other	510	+5	4
Haines Borough	161	+5	-	Sutton-Alpine	134	+1	-
Haines	161	+5	-	Wasilla	10,479	+58	50
Other	4	-	-	Willow	234	-	-
				Other	212	+1	1

Note: As of August the state is back to reporting stats on Monday through Friday

## Total beds in Alaska occupied by confirmed COVID-19 cases

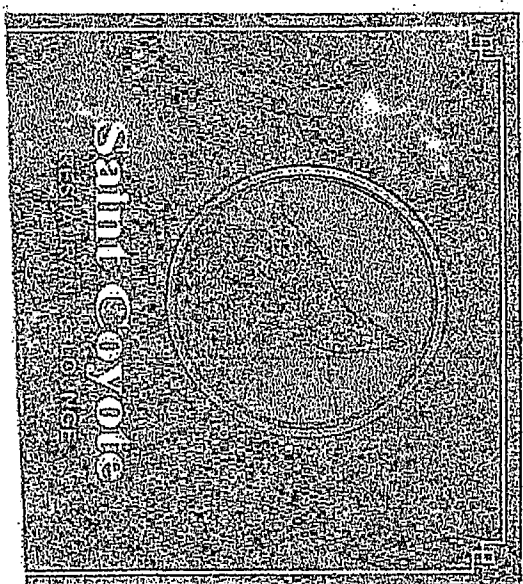
Currently: 196

As of noon  
Tuesday, Sept. 21

A M J J A S O N D J F M A M J J A S

200  
150  
100  
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Note: Based on most recently completed survey of Alaska health facilities, reported as of the previous day. Not all facilities may report results each day. In which case the results from the last completed survey are used. Includes Critical Access Hospitals (CAH) and General Acute Care Hospitals (GACH).  
Source: Alaska Department of Health and Social Services  
KEVIN POWELL / Anchorage Daily News



# ANCHORAGE DAILY NEWS

THURSDAY, SEPTEMBER 23, 2021

ALASKA'S NEWSPAPER | WINNER OF THE PULITZER PRIZE FOR PUBLIC SERVICE — 1976, 1989, 2020

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## CORONAVIRUS

### Crisis standards of care activated for entire state

The decision gives hospitals the ability to ration care if necessary.

Zaz Hollander  
Anchorage Daily News

Alaska is activating crisis standards of care for the entire state and bringing in contracted health workers as staff shortages and influx of COVID-19 patients make it difficult for hospitals to operate normally.

Gov. Mike Dunleavy and top health officials announced the hospital support on Wednesday, the same day Alaska's new single-day cases hit another record as the highly infectious delta variant drives infections.

A combination of short staffing and high numbers of COVID-19 patients is overwhelming medical facilities in Anchorage, Mat-Su and Fairbanks. Rural hospitals say they struggle to transfer patients to urban centers for higher care. At least one

patient died recently when a bed in Anchorage wasn't available.

The Alaska Department of Health and Social Services enabled crisis standards of care Wednesday through a new addendum to the state's existing COVID-19 public health order, officials announced.

Hundreds of medical personnel are also coming to Alaska to help offset staff shortages at numerous health care facilities. Almost 300 registered nurses and more than 100 certified nursing assistants or patient care technicians, funded through an \$87-million contract between the state and the federal General Services Administration.

Along with crisis standards and more workers, the state is addressing a shortage of certified nurse assistants with more training flexibility, officials say.

Five communities — Anchorage, Juneau, Kenai, Fairbanks, Mat-Su — will

See CRISIS STANDARDS, A6

### Alaska to bring nearly 500 health care workers from the Lower 48 to help hospitals

Annie Berman  
Anchorage Daily News

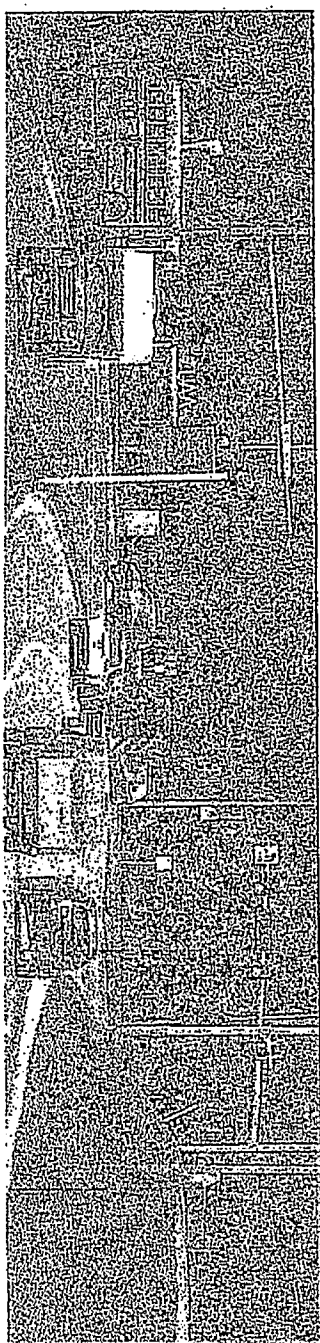
In the middle of a COVID-19 surge that has overwhelmed Alaska's hospitals to crisis levels, Alaska officials said Wednesday that the state has signed a contract to bring nearly 500 health care workers from the Lower 48 to provide some relief.

The \$87 million contract, signed Tuesday, with a company called D.L.H. Solutions will bring 470 contracted health care workers to facilities around the state

beginning next week, Heidi Hedberg, public health director with the Alaska Department of Health and Social Services, said during a community briefing.

Wednesday's announcement came on the same day that Alaska reported a record 1,261 new COVID-19 cases, and hospitals are continuing to struggle with a shortage of workers as resources are stretched to their limit.

See WORKERS, A6



CORONAVIRUS

## Alaska hits new daily record with

FROM PAGE A1

## CRISIS STANDARDS

make use of "mobile integrated health care" to take pressure off hospitals, state public health director Heidi Hedberg said. Juneau is ramping up their program this week using telemedicine with a Bartlett Regional Hospital doctor. The other four communities are still developing plans.

The state health department also ordered \$2 million in rapid at-home testing kits for schools, officials say.

This week, the state hit the highest new COVID-19 case rate per capita in the country. State data shows one of five Alaskans hospitalized this week had the virus.

Alaska's hospital administrators warned of a pending health-care catastrophe in late July. Dunleavy early this month rolled out a statewide COVID-19 disaster declaration. Legislation he proposed instead to support hospitals through telemedicine and streamlined background checks died in the state House.

On Wednesday, the Alaska State Hospital and Nursing Home Association in a statement said the state's announcement of staffing support "and the recognition that care standards are rapidly escalating to crisis" were welcome developments.

Dunleavy, pressed by reporters on a vaccine mandate to relieve pressure on the health care system, said "while vaccinations remain the most important tool," he will not require them.

"The case numbers are much higher than any of us want. The pressure on our hospitals grow greater every day. We're going to get assistance. But that doesn't mean that individual Alaskans should not or cannot help themselves," Dunleavy said, urging people to "be very careful" over the next month. "The delta variant is causing a lot of infection, it's causing a number of folks to go to the hospital, and it is causing people to die. These are facts."

Alaska, once the most vaccinated state in the nation, has dropped into the bottom third. The state ranked 18th for seven-day death rate per capita.

## 'Active misinformation campaigns'

The briefing from state officials came amid a politically charged climate where some Alaskans, including elected officials, challenge public health messaging as false.

Viewers on a Facebook livestream of Wednesday's briefing peaked at about 1,350 people. Several responded to the statements from Dunleavy and others with unsubstantiated misinformation about unproven COVID-19 treatments, the vaccine and the state of the pandemic. Others simply said "fake numbers," "lies," and "propaganda," as health officials outlined the dire situation playing out across the state.

Vaccination remains the single best way to prevent severe illness and hospitalization from the virus, said the state's chief medical officer, Dr. Anne Zink. Two-thirds of the new cases reported Wednesday are going to get sick, miss work, maybe need treatment at the emergency room or worse.

Zink urged Alaskans to not be "distracted by other treatment options such as ivermectin that has not shown benefit for COVID-19 at this time" and instead get proven treatment like monoclonal antibodies.

"Epidemics will come, and they will go, but we collectively control how quickly this will happen, and how many Alaskans we're going to lose along the way," she said, her voice appearing to break as she said prompt action is necessary to relieve hospital pressure.

"Kindness and compassion are important to all, especially to our health care workers who are committed to providing care to all Alaskans," Zink continued. "There's active misinformation campaigns about health ... and about treatment options, so please speak to your health care

provider if you have questions."

Numerous hospitals around Alaska say that, while staffing shortages are a longstanding problem, the recent surge in mostly unvaccinated COVID-positive patients has pushed their capacity over the edge. Hospitals say they are already postponing nonurgent surgeries and holding patients in emergency departments for days.

## 'Care has shifted'

The state's largest hospital, Providence Alaska Medical Center, declared crisis standards on Sept. 11 when doctors say they started deciding which severely ill patients got scarce resources like ICU beds.

Alaska lacks a crisis standards statute, Zink said. Instead, the state can offer guidelines to help clinicians make decisions when resources like ventilators are in short supply. Many facilities are already making changes like nurses caring for more patients or creating alternate ICU or COVID-positive treatment areas.

"Care has shifted in Alaska's hospitals," she said. "The same standard of care that was previously there is no longer able to be given on a regular basis."

Generally, a crisis standards declaration is seen as a last resort that means the number of patients needing care is more than hospitals can handle because of staff, bed or equipment shortages. Providers can prioritize patients based largely on their likelihood of survival or even deny treatment.

Enacting crisis care standards provides liability for providers as well as support to hospitals, health care facilities and local health authorities, Commissioner of Health and Social Services Adam Crum said.

"We want to make sure that Alaskans always have access to a very high level of care," Crum said. But for health care providers, if they're not able to provide this golden standard of care, it actually hurts. State health officials developed

statewide crisis-care guidelines at the start of the pandemic in March 2020, the 37-page "Patient Care Strategies for Scarce Resource Situations" based on Minnesota protocols.

Crisis-care enactment lets the state share ethical guidelines to health-care providers when they have too many patients and not enough resources to care for them all, according to information from the state. A 15-person committee can help provide guidance on alternative strategies and other tools that may be available.

The state holds daily calls with hospitals around the state about capacity. Health officials say it's still up to each hospital and health-care facility to make any decisions.

Numerous hospitals and a few states are turning to crisis protocols. Idaho in early September activated statewide crisis standards of care. Some hospitals in Montana have turned to crisis standards as well. Hawaii's governor this month released health workers from liability if they have to ration care.

Soldotna's Central Peninsula Hospital was operating at 122% capacity Wednesday. About a third of its patients — 21 out of 60 — were COVID-positive, three of them fully vaccinated.

"There were 31 employees across 16 departments out sick with the virus or quarantined at home after coming in contact with an infected person, spokesman Bruce Richards said Wednesday morning."

Central Peninsula canceled elective inpatient surgeries for Tuesday and Wednesday, though staff was finally able to transfer a few patients to Anchorage after being unable to move anyone for several weeks.

The hospital is assessing patient loads and needs on a "24-hour basis" but currently isn't at crisis-care mode, Richards said. "We're not there. Sometimes it feels like we are."

Reporters James Brodie and Morgan Kratow contributed to this story.

Exhibit

FROM PAGE A1

therapists, 14 medical laboratory technicians and 19 other staff took

Cook, chairman of the Peninsula



# Alaska hits new daily record with over 1,200 COVID-19 cases reported

ADW

9/23/21

State is "at the worst place in the pandemic that we've had this entire time," notes Alaska's chief medical officer, Dr. Anne Zink.

Annie Berman  
Anchorage Daily News

Alaska's current COVID-19 surge hit new heights Wednesday as the state reported another 1,251 new cases, marking another daily case record since the pandemic began as hospitals continue to operate under extreme stress and some are forced to ration care.

It's the second time in two weeks that the state has shattered its daily case record: The previous high was recorded last Wednesday, with 1,095 cases, followed by a second consecutive day of more than 1,000 new infections.

## INSIDE

North Slope  
communities hit  
hard by COVID-19  
surge. A2

Propelled by a sharp rise in new infections, Alaska continues to have the highest COVID-19 case rate per capita in the country, according to a New York Times tracker updated Wednesday.

"This is not the direction that we want to go in," Gov. Mike Dunleavy said Wednesday during a briefing with top state health officials. "Our case counts are rising. This is concerning, and should be concerning to all of us. It's impacting our hospitals greatly. It's impacting our hospital capacity and the ability to get the care that you need."

Dunleavy on Wednesday announced that Alaska was implementing crisis standards of care for the entire state, a drastic step that signals staff shortages and influx of COVID-19 patients could make it impossible for some hospitals to treat everyone.

Alaska is "at the worst place in the pandemic that we've had this entire time," said Dr. Anne Zink, the state's chief medical officer. "We have more cases, we have our hospitals being overrun by the number

# RECORD

of patients that are coming there, and we need to collectively to move that direction."

Dunleavy urged Alaska to take individual steps to help slow the spread of the virus but stopped short of issuing or supporting mandates.

"This virus is real," he said. "It's causing more infections, it's causing more people to go to the hospitals, it's causing more deaths. This is a fact."

Alaska's hospitals continue to operate under extreme stress.

Last week, the state's largest hospital, Providence Alaska Medical Center in Anchorage, announced it was shifting to crisis standards of care and rationing treatment due to a combination of staffing shortages and COVID-19 cases that accounted for about a third of the hospital's patients.

When hospitals are full, that affects care for all patients—not just those sick with COVID-19, Dunleavy said.

"There's less and less space and capacity for what we deal with on a daily basis," he said. "So, car accidents, strokes, heart attacks or other cardiovascular issues."

At Providence, at least one hospital patient has died as a direct result of limited resources and impossible choices doctors have had to make, hospital administrators said early this week. It's likely that Providence will remain in

below a record of 210 earlier this month, but far above last winter's previous peak. Hospitals say those numbers are likely an undercount of the true impact of COVID-19, since they don't include some long-term COVID-19 patients who no longer test positive but still need hospital care.

State officials on Wednesday announced other actions being taken to address the worsening pandemic situation in Alaska. The state has signed an \$87 million contract that will allow hundreds of medical personnel to come Alaska to assist health care facilities, according to Heidi Hedberg, public health director with the Alaska Department of Health and Social Services.

Additionally, the Board of Nursing has passed emergency regulations reducing the required number of training hours for certified nurse assistants to expedite the certification process; the state is working with the Alaska State Hospital and Nursing Home Association on heightened recruitment for CNAs; Alaska's health department is purchasing \$2 million worth of at-home antigen testing kits to be distributed through schools to families; and the state is also pursuing ways for emergency medical service providers in major population centers to help alleviate pressure on hospitals through telemedicine, transfers to alternate health care facilities and at-home checks, Hedberg said.

One new COVID-19 death was reported Wednesday, involving an

## Total beds in Alaska occupied by confirmed COVID-19 cases

Currently: 200

As of noon Wednesday, Sept. 22



Note: Based on most recently completed survey of Alaska health facilities, reported as of the previous day. Not all facilities may report results each day, in which case the results from the last completed survey are used. Includes Critical Access Hospitals (CAH) and General Acute Care Hospitals (GACH). Source: Alaska Department of Health and Social Services

KEVIN POWELL / Anchorage Daily News

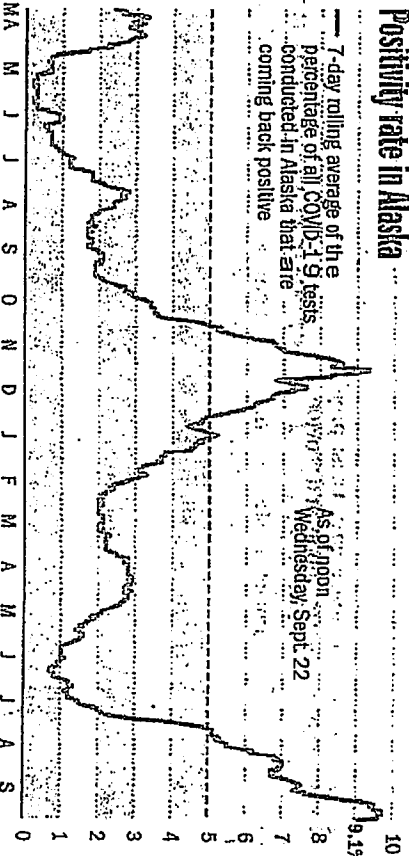
**At Providence, at least one hospital patient has died as a direct result of limited resources and impossible choices doctors have had to make, hospital administrators said early this week. It's likely that Providence will remain in crisis mode for at least another two weeks, they said.**

Alaska's rate of vaccination has been rising slowly in recent weeks. As of Wednesday, 62.6% of Alaskans had received at least one dose of vaccine and 58% were fully vaccinated. The statewide seven-day rolling average for test positivity—positive results out of total performed—was 9.07% as of Wednesday.

## Positivity rate in Alaska

— 7-day rolling average of the percentage of all COVID-19 tests conducted in Alaska that are coming back positive

As of noon Wednesday, Sept. 22



The positivity rate is the percentage of all coronavirus tests performed daily that are actually positive based on a 7-day rolling average. (7-day rolling average of positive tests daily) / (7-day rolling average of total tests daily) x 100%. State health officials consider positivity rate the best measure of whether testing capacity can keep up with current cases. The World Health Organization recommends positivity stay below 5%. Given the Alaska's robust testing program and isolated health-care systems, officials here say they hope to keep the level below 2%.

Source: Alaska Department of Health and Social Services

KEVIN POWELL / Anchorage Daily News

## Alert levels by borough

Alert levels are calculated from the number of reported cases over the past 7 days per 100,000 Alaskan residents in



As of noon Wednesday, Sept. 22

Alert levels are calculated from the number of reported cases over the past 7 days per 100,000 Alaskan residents in

workers, including burnout and on leave.  
COVID-related absences.

A more realistic concern is the 0.5% — of 1,850 employees with

emptions aren't allowed on campus if they're not vaccinated.

About 14 caregivers or just

See STAFFING, A11

## SNOWMAN AT CROSS-COUNTRY CHAMPIONSHIPS



Hobbie kisses a snowman built along the race course at the Cook Inlet Conference cross-country championships Saturday. Between snowman-making and snowball-throwing, sure-footed athletes tested their skills in the slush  
page A7.

EMILY MESNER / ADN

## guns, religion top a big term ly divided US Supreme Court

WIDE

Women's march targets Supreme Court. B1

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by the coronavirus pandemic, and the possible retirement of 83-year-old liberal Justice Stephen Breyer also looms.

It's the first full term with the court in its current alignment.

Justice Amy Coney Barrett, the last of former President Donald Trump's three high-court appointees, is part of a six-justice conservative majority. Barrett was nominated and confirmed last year amid

the pandemic, little more than a month after the death of Justice Ruth Bader Ginsburg.

Trump and Republicans who controlled the Senate moved quickly to fill the seat shortly before the 2020 presidential election, bringing about a dramatic change in the court's lineup that has set the stage for a potentially law-changing term on several high-profile issues.

With abortion, guns and religion already on the agenda, and a challenge to affirmative action waiting in the wings,

See SUPREME COURT, A5

ALASKA CORONAVIRUS

ADN

## Crisis standards of care now active for 20 facilities

10/3/21

Alaskans urged to still seek vital care as hospitals shift to guidelines for how to make tough calls on treatment using scarce resources.

Annie Berman  
Anchorage Daily News

Following weeks of rising COVID-19 case counts and a tide of hospitalizations that have strained hospitals around the state, 20 health care facilities in Alaska are now operating under crisis standards of care.

The shift to crisis standards is often seen as a worst-case scenario. They're meant to provide both guidance and liability protection for health care workers operating with extremely scarce resources.

The 20 hospitals that requested crisis standards make up a majority of Alaska's 31 health care facilities, and they cover nearly every region of the state — on the road system and off, from Southeast to Northwest Alaska to Bristol Bay and all along the Railbelt.

Heidi Hedberg, director of the state Division of Public Health, said in an interview Saturday that the move to crisis standards is a sign that hospitals are getting closer to having to make extremely difficult decisions about patient care, calling the changes at Alaska hospitals in recent weeks "a slow progression."

These hospitals "really are toggling further and further into the space where ... they're having to pull in that triage team to make a clinical decision, which didn't

Workers from the Lower 48 arrive at ANMC to offer relief.

COVID-related deaths in U.S. exceed 700,000. B1

Exhibit 1  
See CRISIS CARE, A4

sis standards is seen as a pre-emptive measure, Hedberg said.

"Some of the (20) hospitals said, 'We want to know that we have that liability, so at 2 a.m. in the morning, if we have to pull our triage team together and use the state document, we have that' " in place, she said.

Alaskans should know that the move doesn't mean that care is no longer available at hospitals — and they shouldn't delay seeking important medical care when they need it.

"Alaskans are going to receive care, but it may not be the care that they need," she said. "It may be that the resources that they need may not be there."

#### "A heavy psychological burden"

Alaska's hospitals have been operating under high levels of stress for months. In the midst of the sharpest coronavirus surge in the nation, the state's limited health care system is particularly vulnerable due to its isolation and large rural population.

"Right now, we have five times the national average in cases, which reflects in our hospitalizations, but we have one of the most limited health care systems" in the country, Hedberg said.

In recent weeks, some impacts to care have included limited kidney dialysis therapy, a shortage of oxygen supplies, staffing shortages and difficulty transferring patients from rural communities, as Anchorage hospitals have been particularly full with critically ill patients in recent months.

Triage teams at hospitals are made of clinical ethicists, medical ethicists and, sometimes, pastors. They exist to help physicians make difficult decisions.

"There's a heavy psychological burden to these physicians that are treating patients at the bedside when they don't have enough resources," Hedberg said.

"If a physician says, 'I have two patients, and I have one resource. What do I do?' They have to go

- Central Peninsula Hospital
- Cordova Community Medical Center
- Fairbanks Memorial Hospital
- Manillaq Health Center
- Mat-Su Regional Medical Center
- Norton Sound Health Corp.
- Petersburg Medical Center
- Providence Alaska Medical Center
- Providence Kodiak Island Medical Center
- Providence Seward Medical Center
- Providence Valdez Medical Center
- SEARHC/Mt. Edgecumbe
- South Peninsula Hospital
- Elias Specialty Hospital
- Wrangell Medical Center
- Yukon Kuskokwim Health Corp.

to this triage committee, and that triage committee will review the information and help make a decision, so it's not on the shoulders of that bedside physician," she said.

Hedberg said she has heard of just three examples so far in recent weeks of an Alaska doctor having to make a difficult decision about resource allocation.

The 20 affected facilities include: Alaska Native Medical Center; Alaska Regional Hospital; Bartlett Regional Hospital; Bristol Bay Area Health Corp.; Kakanak Hospital; Central Peninsula Hospital; Cordova Community Medical Center; Fairbanks Memorial Hospital; Manillaq Health Center; Mat-Su Regional Medical Center; Norton Sound Health Corp.; Petersburg Medical Center; Providence Alaska Medical Center; Providence Kodiak Island Medical Center; Providence Seward Medical Center; Providence Valdez Medical Center; SEARHC/Mt. Edgecumbe; South Peninsula Hospital; Elias Specialty Hospital; Wrangell Medical Center; and Yukon Kuskokwim Health Corp.

#### Flexibility and a push for resources

Several of those health care facilities had previously enacted crisis standards of care unique to their facility.

Providence Alaska

triage team to make difficult care decisions when necessary. At Alaska Native Medical Center, the decision to move to crisis standards was mainly made to allow for more flexibility for providers.

For these 20 facilities, crisis standards of care "will remain in effect until there are sufficient resources to provide the usual standard of care to all patients," the state health department said in a statement.

To address the staffing crunch at many of Alaska's hospitals, the state has signed a federal contract to bring in about 470 health care workers from outside. They started arriving this week.

The state also recently ordered five dialysis machines from the national stockpile plus more oxygen, and continues to do everything it can to prevent further crisis, Hedberg said.

At the beginning of the pandemic, Alaska's hospitals worked together to draft the crisis standards of care guidelines, which break down specific topics around resources including oxygen, staffing, nutritional support and medication administration.

It wasn't until last month, when rising COVID-19 hospitalizations caused the state's health care system to be overwhelmed, that the document came into play. The state enabled crisis standards in an addendum to a public health emergency order.

When health care facilities reach a point of extreme stress, they now have the ability to appeal to Alaska's health commissioner and the state's crisis care committee, which is made up of 15 physicians and health officials from both tribal and non-tribal hospitals around the state. The state can then approve the hospitals' requests to activate crisis standards.

"That's what happened yesterday," Hedberg said.

A 'highly fluid' situation and 'very serious surge' in Fairbanks

Foundation Health Partners, which operates

ly, said Dr. Angelique Ramirez, chief medical officer for Foundation Health Partners, which also operates Tanana Valley Clinic and the Denali Center. "This is in response to a very serious surge of COVID in our community."

The Fairbanks health organization also referenced a shortage of monoclonal antibody treatment, which health officials say is a highly effective treatment for high-risk individuals with COVID-19 early on in their illness, though they've stressed that it's not a substitute for getting vaccinated.

Other factors involved in the decision, according to Ramirez, include "community spread driven by low vaccination rates and low mask utilization," high patient numbers and inpatient acuity.

As of Friday, about one in three inpatients at Fairbanks Memorial Hospital were COVID-positive.

The shift to crisis standards "impacts all patient care, those with broken bones, traumas, heart attacks, strokes, COVID, anyone needing medical care could be impacted," Ramirez said. "The care we are able to provide is highly fluid and can change day-by-day and even hour-by-hour depending on the availability of resources within our system and statewide."

The Fairbanks North Star Borough is one of the least vaccinated regions of the state, with about 52% of residents fully vaccinated. University of Alaska interim president Pat Pitney said in a letter Friday that the chancellor of the University of Alaska Fairbanks asked her to consider approving a vaccine requirement for staff and in-person students at its Fairbanks locations. An update is expected within two weeks.

Health officials continue to encourage people to wear a mask in public, receive a vaccination if possible and get tested if COVID-19 symptoms develop.

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# The 2 pressing questions from the Assembly circus

Anchorage Daily News editorial board

By any measure, the seemingly never-ending stream of vitriol at the Anchorage Assembly's mask mandate debate over the past week was a depressing spectacle. If you showed up in person or tuned in to the livestream Tuesday, Wednesday or Thursday evening, you were witness to an hours-long hatefest that displayed just how degraded our politics has become, even at the local level. After watching the proceedings for any length of time, two questions were sure to come to mind: "How did we come to this?" and "Can it possibly get worse?"

The discourse at the meeting was as ugly as this city has seen. Sprinkled in among the many conspiracy theories and "alternative facts" that testifiers brought forth were threats — some directed at Assembly members, some at others in the audience who disagreed. The threats ranged from vague — of the "you'll see what happens if you pass this" variety — to unsettlingly specific and violent, such as the person who said it was "time to get

out the gallows" for the Assembly. One person Thursday referred to where we stand now as "1776, a reference to the beginning of the American Revolution that also echoed the far-right rhetoric of those who participated in the Jan. 6 insurrection in Washington, D.C. On Wednesday, several people wore yellow Star of David badges, complete with mock Hebrew, meant to evoke those that Jews were forced to wear by Nazis before and during the Holocaust — a false equivalency that gravely minimized the magnitude of that atrocity. Members of the public swore, shouted slurs at Assembly members and belittled other attendees. It was, in plain terms, a mob.

Worst of all, amid the chaos, police discovered a man was carrying a concealed handgun — during his arrest Wednesday for disorderly conduct. It doesn't take a genius to understand why mixing deadly weapons, a volatile crowd and a divisive argument is a terrible idea. So, in answer to the second question — can it get worse? — the answer is yes, in ways too terrible to contemplate. And the fact that's a realistic concern is a sad statement about where we are.

As to how we got here, there are both complex and surprisingly simple reasons. The complex ones have to do with a host of external factors — cable news networks and online blogs in the business of confirming biases rather than challenging them. Social media algorithms that increasingly segregate us into silos of echo chambers. A trickle-down corrosion of our politics from the national to the local level, in which politicians and partisans are increasingly willing to tear down the guardrails of civility and civic-mindedness to score wins and, worse, rig the rules of our system.

The simple reasons are the ones that are harder to countenance. We've let our political views become inextricable from our views of ourselves, and in doing so, we've chosen to forget that we're all in this together. Rather than find ways to work out our differences, many of us have become obsessed with getting our way at

all costs, regardless of who it hurts — including ourselves.

There are strong moral reasons why the behavior exhibited at the Assembly meetings in the past week should be off-limits. But there are practical, pragmatic ones too. Those who came to testify against the mask mandate said they stood for liberty and American values, but the record shows the opposite. They came to yell, belittle, grandstand and disrupt. They shouted down those who disagreed, and made threats toward elected officials. That's not the democratic process, that's anarchy and hunger. The crowd meant to protest those who they saw as wanting to take away their rights — and in practice, they did so by taking away others' rights to be heard.

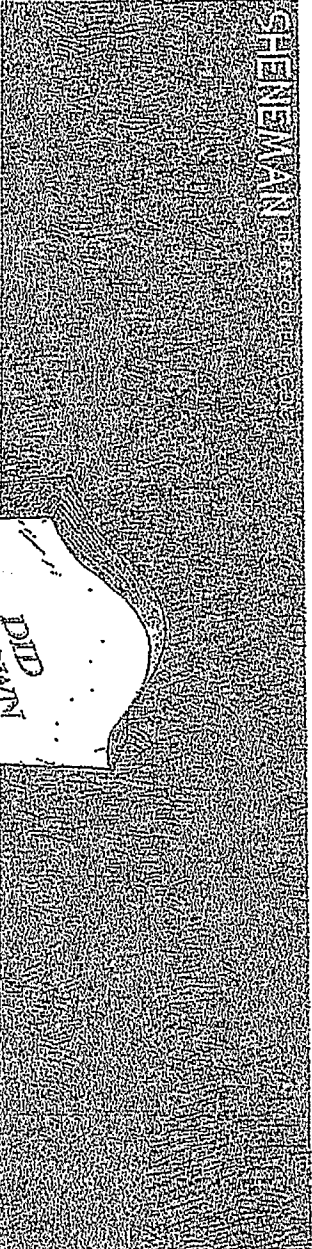
You can't preserve liberty by enforcing your own will through bullying tactics, making those who stand against you fear for their safety. That has another name: tyranny. And it's something we all ought to be able to stand against.

COMMENTARY

I wrote

a book about  
a pandemic

Lauren A. Miller



10/4/21

# Fact-checking claims about case trends, death rates, masks and ivermectin

Recent statements from public officials paint a different picture of pandemic than data shows.

Annie Berman and Morgan Krakow  
Anchorage Daily News

Alaska is at a critical point in the pandemic. Twenty health care facilities across the state are now operating under crisis standards of care, a reflection of the added pressure

facing hospitals that are contending with scarce resources and high COVID-19 patient counts — and bracing for worse. Alaska's recent per-capita case rate is the highest in the U.S., and higher than that of any country in the world.

At the same time, recent statements from public officials paint a much different picture of the pandemic, warranting closer scrutiny.

In Anchorage over the past week,

a divided city debated whether to implement a mask mandate, and Mayor Dave Bronson touted a debunked medical treatment, pointed to data that he said showed Alaska's case counts were actually declining and questioned the effectiveness of masks.

We fact-checked some of these claims.

See VIRUS.A16

## VIRUS

Case counts are staying high, but there's a COVID-19 case onset graph that appears to show a recent decline. What's going on?

Anchorage Mayor Dave Bronson, who opposes a proposed citywide mask mandate and COVID-19 mandates in general, recently cited a graph on the city's COVID-19 dashboard that he said showed a decline in the city and state. His remarks during Wednesday night's tumultuous Anchorage Assembly meeting came in response to a testifier who was speaking in support of the mask ordinance.

Bronson said to the testifier: "I'm looking at the case onset by date graph, and I see that the seven-day moving average for both the state and municipality have been decreasing significantly since Sept. 18. I'm just curious, in your mind, which mandate caused those decreases?" A video of Bronson's remarks popped up the next day, posted by his mayoral Facebook account.

In the graph Bronson was looking at, "onset date" refers to the day a person's symptoms first began or, if they're asymptomatic, the day they got tested.

Because the date a person gets tested or first experiences symptoms occurs earlier than the date the state reports that case, the last few weeks of data in the case onset graph are missing information that will get added in the coming days. Louise Castrodale, an epidemiologist with the state health department, explained last week.

"Because the onset date is something that's in the past, if you're looking at the onset data curve, you'll always see it falling off at the end there," she said. That dip is even more pronounced because of recent backlogs in data processing.

"At a time when there's really fast turnarounds with the labs, the report date and the onset date might be super close to gether, but when we know labs are having trouble processing specimens, and some times reporting in those results, you can really see a difference between that onset date and the report date," she said.

A better way to measure Alaska's current surge is by looking at week-to-week trends, said Dr. Joe McLaughlin, state er

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increase in cases compared to the week before — and the state's seven-day per capita case rate is currently the highest in the nation. Specifically looking at Anchorage, the municipality's seven-day per capita case rate is also higher than any other state's, and there's no evidence in the case numbers of a recent decline.

summer. In June, there were six Alaska residents who died with COVID-19, while there were 21 who died in July, 75 in August and 71 so far reported in September — and that tally could change as health officials tracking the virus receive more information about recent deaths.

medical providers have near-universally and consistently recommended the use of mask-wearing as one of the most effective, easy and inexpensive ways to slow community transmission, protect hospital capacity and prevent deaths.

### Does Alaska really have one of the lowest COVID-19 death rates in the country?

Essentially, it depends: Are you looking at the pandemic overall, or are you looking at how Alaska's doing more recently?

Based on data from the federal Centers for Disease Control and Prevention, Alaska continues to have one of the lowest death rates in the nation since the start of the pandemic, along with Oregon, Maine, Vermont and Hawaii. Alaska has averaged 76 deaths per 100,000 people since January 2020, giving it the fourth-lowest death rate in the country for that time frame.

It's a statistic often touted by Alaska Gov. Mike Dunleavy and Mayor Bronson, even while other data points — like hospital intensive care unit capacity and current case rates — continue to raise alarm from health officials.

However, looking at just the past week, Alaska as of Friday had the highest death rate in the nation, with 11.4 deaths per 100,000 people.

It's important to consider how those death rates get calculated, according to state epidemiologist Dr. Joe McLaughlin. The CDC includes all deaths that were added to the state's COVID-19 dashboard, which last week included many deaths that had occurred earlier in the year. There were actually only 20 that took place in the last seven days, rather than the 80 deaths that pushed Alaska into highest death rate nationally last Friday.

So, we can probably expect Alaska's national position for the seven-day death rate to fluctuate in the next few days. Some might misinterpret the drop in death rate as an example of the state turning the corner on the virus, but that's not exactly the case, said Rosa Avila, who works with COVID-19 data at the state's health department. Rather, it's just that the CDC was no longer including those additional older deaths in the seven-day death rate.

The bottom line, McLaughlin said, is cases are soaring right now.

"And we know that anytime we see a spike in cases, deaths will follow," he said.

That's what has played out across the state as case counts have risen since

### Do masks work?

In a recent op-ed opposing Anchorage's proposed mask mandate, Mayor Bronson wrote: "Certainly, there are many studies that support the use of masks but ... there are also several studies that have found masking and mask mandates largely ineffective. That is why even the World Health Organization has recognized the science on masking is inconsistent and inconclusive."

He's referencing WHO guidance from December 2020 that advised the wearing of masks as one part of a more comprehensive strategy to limit virus spread. The WHO said at the time: "At present there is only limited and inconsistent scientific evidence to support the effectiveness of masking of healthy people in the community to prevent infection with respiratory viruses, including SARS-CoV-2."

Bronson also cited a May 2020 article in a CDC journal that included research from 2018 and earlier, and found "limited" evidence of the effectiveness of surgical masks at preventing flu virus transmission.

Bronson was right that some of those early studies on masking were sometimes confusing and inclusive. But the science behind masking has evolved since those studies he referenced.

The vast majority of research now backs the theory that masks work — that they significantly protect both the wearer and those they come into contact with.

More than 10 studies cited by the CDC have since confirmed the benefits of universal masking at preventing community spread — including an analysis conducted last spring among 12 hospitals in Massachusetts that employees over 75,000 health care workers, a German study published in June 2020 and an Arizona study that tracked transmission rates before and after mask mandates were widely enforced, among others.

"Each analysis demonstrated that, following directives from organizational and political leadership for universal masking, new infections fell significantly," the CDC said.

In Alaska, public health officials and

### Should ivermectin be used to treat COVID-19?

Ivermectin meant for livestock was in high demand at some Alaska feed stores after it gained traction on social media as a purported treatment for COVID-19. The FDA has approved ivermectin in both people and animals for some parasitic worms and for head lice and skin conditions — but the FDA hasn't approved its use in treating or preventing COVID-19 in humans. The agency has strongly urged people not to use it to treat COVID-19, especially since many were turning to formulations meant for animals, not humans.

Kenai Peninsula Borough Mayor Charlie Pierce, who has no background in health or medicine, publicly backed the use of the treatment. Speaking at an Anchorage Rotary Club meeting last week, Bronson claimed the treatment worked very well.

"It's an approved drug and it's very effective," he said. "It's not a horse pill."

Merck, the drug company that manufactures ivermectin, in February explicitly said that researchers found no scientific basis for a potential therapeutic effect against COVID-19 from pre-clinical studies and no meaningful evidence for clinical activity or clinical efficacy in patients with COVID-19. The company also cited "a concerning lack of safety data" in most studies.

Taking too much ivermectin can cause nausea, diarrhea, low blood pressure, itching and hives, dizziness, balance problems, seizures and even death, according to the Oregon Poison Control Center. Ingesting ivermectin formulations that are designed for animals is especially dangerous, as veterinary medications are often more concentrated and many of their ingredients aren't considered safe for human use.

Dr. Anne Zink, Alaska's chief medical officer, said last week that there is no proven benefit to taking ivermectin. Vaccination is the best way to fight the virus, and monoclonal antibody treatment can help those who do contract it to stay out of the hospital, she said.

Contact Annie Berman at [aberman@adn.com](mailto:aberman@adn.com); Contact Morgan Krakow at [mkrakow@adn.com](mailto:mkrakow@adn.com).

# ANCHORAGE DAILY NEWS

ANCHORAGE'S NEWSPAPER | WINNER OF THE PULITZER PRIZE FOR PUBLIC SERVICE — 1976, 1989, 2020

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ALASKA CORONAVIRUS

## Hospitals in flux with near-record patient numbers

Fairbanks Memorial is treating  
its youngest virus patient  
so far — a 2-week-old infant.

Morgan Krakow and Zaz Hollander  
Anchorage Daily News

Alaska's COVID-19 hospitalizations approached record territory Monday, just days after the state announced that crisis standards of care were activated for 20 health care facilities as the worst surge of the pandemic drags on.

A wave of new virus cases in the last several weeks — fueled by the ultra-contagious delta variant and stagnating vaccination rates statewide — has sickened enough people to put unprecedented stress on hospitals already contending with staffing shortages and limited resources.

On Monday, Alaska reported 2,290 new cases: 1,405 on Friday, 781 on Saturday and 409 on Sunday among residents, plus another 55 nonresident cases. Alaska's per-capita case rate over the past seven days remains the highest in the country, according to CDC data.

A majority of the 31 health care

See COVID-19, A16



facilities in the state (a total that includes hospitals and nursing homes) now have crisis standards of care activated, though the situation varies widely from place to place. The challenge of transferring patients from rural communities to outlying hospitals, and from those hospitals to busy Anchorage facilities, was a factor in the shift to crisis standards.

Crisis standards of care provide guidance and liability protection for health care workers operating with extremely scarce resources, and health officials continue to emphasize that people needing important care should still seek treatment at hospitals.

By Monday, 216 people were hospitalized with the virus statewide, just shy of the record set Sept. 24 when 217 COVID-19 hospitalizations were reported. Forty patients were on ventilators.

Roughly 22.5% of the state's hospital patients had active cases of the virus, with likely more people still hospitalized but no longer infectious, and therefore not counted as COVID-19 patients.

The state also reported another COVID-19 death, involving a man from the Kuskokwim Census Area in his 50s. Since January 2020, 558 Alaska residents and 21 nonresidents in the state have died with the virus. As of Monday, Alaska had the 15th highest seven-day per capita death rate in the country, according to CDC data.

Hospitals say they are near or at capacity due to short staffing and continued high numbers of COVID-19 patients who take longer to treat and, when severely ill, require unprecedented amounts of oxygen as well as dialysis equipment that can be hard to staff.

Alaska is one of few states around the country to enable statewide crisis standards of care. Idaho did so last month. Crisis standards, when applied in a worst-case scenario, help doctors make difficult decisions to prioritize treatment for patients most likely to survive. They also provide legal liability protections for providers forced to adopt lower standards of care.

A number of hospitals implemented their own crisis standards prior to the state's decision. Providence Alaska Health

## By Borough or Census Area

State reports stats on all weekdays except holidays

### TOTAL VACCINATIONS

One dose: 355,133  
Change from previous update: +867  
% of pop. 12+ 63.4%  
Completed: 373,169  
Change from previous update: +6,876  
% of pop. 12+ 61.5%

Alutians West  
Census Area  
(324)  
1 died

Alutians East  
Borough  
(129)  
1 died

Bristol Bay  
Borough  
(256)  
5 died

Chukotka  
Census Area  
(1,089)  
1 died

Census Area  
(1,815-6 died)

Census Area  
(5,213)  
25 died

Census Area  
(5,213)  
25 died

Census Area  
(5,213)  
25 died

Census Area  
(5,213)  
25 died

Census Area  
(5,213)  
25 died

Census Area  
(5,213)  
25 died

## COVID-19 cases

including Alaska residents

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State confirmed cases

State data, does not include DoD or VA

Total confirmed cases: 113,037 | Change from previous update: +2,187\* | Total deaths: 558(+4)

Source: Alaska Department of Health and Social Services

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other hospitals, which is stretching staff past their routine services, as well as the organization reaching capacity last week.

They've also had to restrict monoclonal antibody treatment, which has been shown to keep some people with COVID-19 out of the hospital, to those who are likely to benefit from the treatment most and are at highest risk for severe complications from the disease, she said.

While Ramirez said many patients may not see a change in care, some may now be denied access to monoclonal antibodies, have their treatment or surgery deferred, or be discharged from the hospital earlier than usual.

"This is not how any of us want to practice," Ramirez said. "But at this particular point in time with the number of cases that we have in our community, and with the impact on our hospital capacity — the number of staffed beds, the number of staff we have, the resources that we have — this is what's been required."

Staff at the hospital are treating their youngest COVID-19 patient to date, who was just 14 days old on Monday and had pulmonary disease requiring steroid and antiviral treatment as well as oxygen, she said.

The state's guidelines, a 40-page document called "Patient Care Strategies for Scarce Resource Situations," includes instructions to help free up scarce equipment like ventilators or dialysis machines as well as recommendations to avoid crisis care in the first place.

Many larger hospitals also have their own guidelines as well as triage teams to help prioritize care if needed.

### Capacity issues, and some relief

As of Monday, hospitals reported continued capacity issues, though only one was holding patients in the emergency department as they waited for beds to open up, according to Alaska State Hospital and Nursing Home Association senior vice president Jeannie Monk, who listened in on the daily hospital call with state health officials.

"Facilities are all continually evaluating, can they do surgeries that are non-emergent? That's all being evaluated on a daily basis," Monk said. "Some facilities are doing a few, some aren't."

Gov. Mike Dunleavy and Anchorage Mayor Dave Brownson have made it clear they will hold annual news conferences to

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A number of hospitals implemented their own crisis standards prior to the state's decision. Providence Alaska Medical Center, Alaska Native Medical Center, Fairbanks Memorial Hospital, Providence Kodiak Island Medical Center and the Bethel hospital operated by Yukon-Kuskokwim Health Corp.

Some hospitals are reporting that up to nearly half of their patients are COVID-positive.

#### A wide range of circumstances

The situation is fluid and changes from facility to facility and day by day, if not hour by hour, health care officials said this week.

At the state's largest hospital, Providence Alaska Medical Center in Anchorage, the intensive care unit is full. A triage team has consulted on roughly 10 decisions around how to prioritize care for

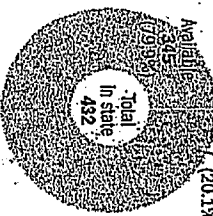
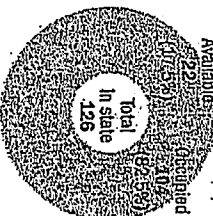
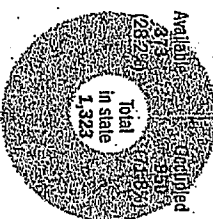
State data, does not include Doh or VA. RESIDENTS  
Total confirmed cases: 113,037 | Change from previous update: +2,187\* | Total deaths: 558(+3)  
Source: Alaska Department of Health and Social Services

#### Status of hospital resources in Alaska\*

Occupied out of total capacity. Includes COVID and non-COVID patients.

As of noon Monday, Oct. 4

Total that have been hospitalized with COVID-19, does not include those currently hospitalized: 2,453



Expanded graphics and more coronavirus coverage at [adn.com](http://adn.com).

#### COVID-19

\* Based on most recently completed survey of Alaska health facilities, reported as of the previous day. Not all facilities may report within each day. \*\* Best estimate includes neonatal intensive care unit bed capacity. Reported bed counts can be calculated by subtracting inpatient and ICU bed counts. Source: U.S. Department of Health & Human Services

patients, according to spokesperson Mikal Canfield.

Bartlett Regional Hospital in Juneau, one of the 20 facilities on the state list, is "nowhere near re-allocating care for our patients" but the designation provides flexibility if that point comes, according to a statement Sunday night from chief nursing officer Kim McDowell.

Outpatient elective surgeries continue and surgeries that need a post-op hospital stay are assessed daily, hospital officials say. Bartlett has five infectious COVID-positive patients as well as a large amount of resources and specialist care for lingering effects of the virus, McDowell said.

At Alaska Regional Hospital in Anchorage, the activation of crisis standards of care gives the facility flexibility in how to treat patients and use resources, according to spokesperson Kjerstin Lastufka.

Staff there have not had to start making decisions about how to allocate resources or treatment, Lastufka said in an email,

Unfathom (14)  
Kevin Powell / Anchorage Daily News

Adult ICU bed capacity

Ventilator capacity all ages

and the hospital hasn't made immediate changes to operations. The hospital's 14-bed intensive care unit and six-bed ICU pod are near capacity, filled mostly with COVID-19 patients, Lastufka said.

Mat-Su Regional Medical Center near Palmer is using 10 times as much oxygen as usual due to the demands of COVID-19 patients, according to emergency department director Dr. Thomas Quinby.

The hospital last week was running so short on ventilators that administrators had to request five from a state stockpile, and Mat-Su Regional is also struggling to obtain testing supplies, Quinby said.

But the hospital is "nowhere near having no resources for someone," he said. "There is a plan in place."

At Kanakak Hospital in Dillingham last week, several patients who needed high levels of oxygen were transferred out and a few lower-severity patients were transferred in, according to Jennifer DeWine, spokesperson for Bristol Bay Area Health Corp. A new state transfer center is helping coordinate patients moving between hospitals, DeWine said.

Dr. Angelique Ramirez — chief medical officer for Foundation Health Partners, which operates Fairbanks Memorial Hospital — said the basis for last week's decision to shift to crisis standards boiled down to an inability to transfer patients to

WE DRIVE THE REPORTER'S RIGHT WE DRIVE THIS IS WHAT'S BEEN REQUIRED.

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"Facilities are all continually evaluating, can they do surgeries that are non-emergent? That's all being evaluated on a daily basis," Monk said. "Some facilities are doing a few, some aren't."

Gov. Mike Dunleavy and Anchorage Mayor Dave Bronson have made it clear they will not enact new restrictions to curtail the spread of the virus.

Dunleavy last month announced several other measures intended to take pressure off the state's strained health care system, including bringing in 470 federally contracted workers who began arriving last week to fill in for exhausted caregivers around the state.

"That will make a big difference in just the level of stress in the staffing," Monk said.

On Monday, 9.5% of tests returned positive results based on a 7-day rolling average, which is nearly double the state's target of a 5% positivity rate.

Of Alaskans ages 12 and older 63.4% had received their first dose of the vaccine Monday while 61.5% were considered fully vaccinated.

NATIONAL CORONAVIRUS

## Doctors grow frustrated over COVID-19 denial, misinformation

Heather Hollingsworth  
Associated Press

The COVID-19 patient's health was deteriorating quickly at a Michigan hospital, but he was having none of the doctor's diagnosis. Despite dangerously low oxygen levels, the unvaccinated man didn't think he was that sick and got so irate over a hospital policy forbidding his wife from being at his bedside that he threatened to walk out of the building.

Dr. Matthew Trunsky didn't hold back in his response: "You are welcome to leave, but you will be dead before you get to your car," he said.

Such exchanges have become all-too-common for medical workers who are growing weary of COVID-19 denial and misinformation that have made it

See VIRUS DENIAL, A6

# FROM PAGE A1 VIRUS DENIAL

exasperating to treat unvaccinated patients during the delta-driven surge.

The Associated Press asked six doctors from across the country to describe the types of misinformation and denial they see on a daily basis and how they respond to it.

They describe being aggravated at the constant requests to be prescribed the veterinary parasite drug ivermectin, with patients lashing out at doctors when they are told that it's not a safe coronavirus treatment. People routinely cite falsehoods spread on social media, like an Illinois doctor who has people tell him that microchips are embedded in vaccines as part of a ploy to take over people's DNA. A Louisiana doctor has resorted to showing patients a list of ingredients in Twinkles, reminding those who are skeptical about the makeup of vaccines that everyday products have lots of safe additives that no one really understands.

Here are their stories:

## LOUISIANA DOCTOR Just stop looking at Facebook!

When patients tell Dr. Vincent Shaw that they don't want the COVID-19 vaccine because they don't know what's going into their bodies, he pulls up the ingredient list for a Twinkie.

"Look at the back of the package," Shaw, a family physician in Baton Rouge, Louisiana, "tell me you can pronounce everything on the back of that package. Because I have a chemistry degree, I still don't know what that is."

He also commonly hears patients tell him they haven't done enough research about the vaccines. Rest assured, he tells them, the vaccine developers have done their homework.

Then there are the fringe explanations: "They're putting a tracker in and it makes me magnetic."

Another explanation left him speechless: "The patient couldn't understand why they were given this for free, because humanity in and of itself is not nice and people aren't nice and nobody would give anything away. So there's no such thing as inherent good nature of man. And I had no comeback from that."

People who get sick with mild cases insist that they have natural immunity. "No, you're not a Superman or Superwoman," he tells them.

He said one of the biggest issues is social media, as evidenced by the many patients who denigrate what they saw on Facebook in disbelief about vaccine effectiveness.

He said the key to overcoming hesitancy is to figure out where it originates. He said when people come to him with concerns about fertility, he can point to specific research showing that the vaccine is safe and their issues are unfounded.

But he says there's no hope in changing the minds of people who think the vaccines are laced with poison. "I'm probably not going to be able to show you anything that convinces you otherwise."

And he thinks he could change people's minds about the vaccine if they could follow him around for a shift as he walks past the beds of the sick and dying, almost all of whom are unvaccinated.

## MICHIGAN PULMONOLOGIST Facebook post unleashes his frustration

For Trunsky, the vaccine pushback grew so intense that he turned to Facebook to describe the ire he confronts on a daily basis at Beaumont Hospital in Troy, Michigan. The post listed eight encounters he had in the two previous days alone in which COVID-19 patients explained misinformation-fueled reasons for not getting vaccines or made demands for unproven treatments.

Example No. 5 was a patient who said he'd rather die than take the vaccine. Trunsky's response: "You may get your wish."

He has heard a litany of misinformation about the vaccine. They say it's not proven and only experimental when in fact it is not. Others tell him the vaccine is a "personal choice and that the government shouldn't tell me what to do." He also has heard patients tell them they are too sick and didn't want to risk the side effects of the vaccine. One young mother told him she wasn't vaccinated because she was breastfeeding, although her pediatrician and obstetrician urged her it was safe. She had to be hospitalized but eventually got a shot.

Others, though, take out their anger on health care providers. Some threaten to call attorneys if they don't get a prescription for ivermectin, commonly used by veterinarians to kill worms and parasites. The drug can cause harmful side effects and there's little evidence it helps with the coronavirus.

He estimates that he has cared for 100 patients who have died since the pandemic began, including the man who threatened to walk out of the hospital.

## ILLINOIS FAMILY PHYSICIAN Traces misinformation back to Scripture, Nicki Minaj

Dr. Carl Lambert hears lots of wild misinformation from his patients. Some comes from the Bible, like people claiming some ingredients from the rubber-wood tree. Some of it is the stuff of internet non-sensational headlines.

"Hey if you do this, maybe you're not as faithful as you should be as, say, a Christian."

Most common, though, is patients just wanting to wait, uneasy with how quickly the vaccine was developed. But he warns them, "Please do not try to wait out a pandemic. A pandemic will win."

He said his job is "a lot of just dismantling what people have heard," answering their questions and reassuring them that "vaccines work like this just like when we were kids."

He has had some luck lately in changing minds. "I've had patients that maybe four months ago said 'You are wasting your time. Dr. Lambert, I don't want to hear you talking about it.' And they'll come back and say, 'Hey, you know what? I've been watching the news. I've seen some stuff. I think I'm ready now.'"

## UTAH DOCTOR Fear of vaccine side effects, then fear of dying

When Dr. Elizabeth Middleton talks to COVID-19 patients about why they aren't vaccinated, they often cite fear of side effects. But as they get sicker and sicker, a different sort of fear sets in.

"They sort of have this sinking look about them, like 'Oh, my God. This is happening to me. I should have been vaccinated,'" said the pulmonary critical care doctor at the University of Utah hospital in Salt Lake City.

She hears often that the vaccine was developed too quickly. "Who are you to judge the speed of science?" she wonders.

Also frustrating is the idea among some patients that there is a "secret agenda" behind getting vaccinated.

"There must be something wrong if everyone is forcing us to do this or everyone wants us to do this," patients tell her. "And my response to that is, 'They are urging you to do it because we are in an emergency. This is a pandemic. It is a national and international crisis. That's why we are pushing it.'"

Getting through to patients and their families is a "delicate line," she says. She tries not to disrupt the patient-doctor relationship by pushing vaccines too hard. But often the people who have been on ventilators need no convincing.

"They are like, 'Tell everyone that they have to be vaccinated. I want to call my family. They need to be vaccinated.'"

## KENTUCKY DOCTOR Political views come into clear focus after diagnosis

Dr. Ryan Stanton recently had a patient who began their conversation by saying, "I'm not afraid of any COVID virus or anything. I just don't want to get vaccinated."

people in a line, a line of people, they reported to show  
ing patients a lot of it, and in a line, reminding  
those who are skeptical about the makeup of vaccines  
that everyday products have lots of safe additives that no  
one really understands.

Here are their stories:

### LOUISIANA DOCTOR Just stop looking at Facebook

When patients tell Dr. Vincent Shaw that they don't  
want the COVID-19 vaccine because they don't know  
what's going into their bodies, he pulls up the ingredient  
list for a Twinkie.

"Look at the back of the package," Shaw, a family phy-  
sician in Baton Rouge, Louisiana. "Tell me you can pro-  
nounce everything on the back of that package. Because  
I have a chemistry degree, I still don't know what that is."

He also commonly hears patients tell him they haven't  
done enough research about the vaccines. Rest assured,  
he tells them, the vaccine developers have done their  
homework.

Then there are the fringe explanations: "They're put-  
ting a tracker in and it makes me magnetic."

Another explanation left him speechless: "The patient  
couldn't understand why they were given this for free, be-  
cause humanity in and of itself is not nice and people ar-  
ent nice and nobody would give anything away. So there's  
no such thing as inherent good nature of man. And I had  
no comeback from that."

People who get sick with mild cases insist that they  
have natural immunity. "No, you're not a Superman or Su-  
perwoman," he tells them.

He said one of the biggest issues is social media, as  
evidenced by the many patients who describe what they  
saw on Facebook in deciding against getting vaccinated.  
That mindset has spawned memes about the many Amer-  
icans who got their degrees at the University of Facebook  
School of Medicine.

"I am like, 'No, no, no, no, no, I shake my head, 'No,  
no. That is not right, no, no. Stop, stop, just stop looking at  
'Facebook.'"

### DALLAS EMERGENCY ROOM DOCTOR

Baffled at how he's 'lost all credibility' with patients

Dr. Stu Coffman has patients tell him they are scared  
about vaccine side effects. They don't trust the regulatory  
approval process and raise disproven concerns that the  
vaccine will harm their fertility. He said the most unex-  
pected thing someone told him was that there was "ac-  
tually poison in the mRNA vaccine" — a baseless rumor  
that originated online.

He is confounded by the pushback

"If you've got a gunshot wound or stab wound or you're  
having a heart attack, you want to see me in the emer-  
gency department," he said. "But as soon as we start talking  
about a vaccine, all of a sudden I've lost all credibility."

that he turned to Facebook to describe the me-  
fronts on a daily basis at Beaumont Hospital in Troy,  
Michigan. The post listed eight encounters he had in the  
two previous days alone in which COVID-19 patients ex-  
plained misinformation-fueled reasons for not getting  
vaccines or made demands for unproven treatments.

Example No. 5 was a patient who said he'd rather die  
than take the vaccine. Trusky's response: "You may get  
your wish."

He has heard a litany of misinformation about the  
vaccine: "They say it's not proven and only experimental  
when in fact it is not. Others tell him the vaccine is a "per-  
sonal choice and that the government shouldn't tell me  
what to do." He also has heard patients tell them they are  
too sick and didn't want to risk the side effects of the vac-  
cine. One young mother told him she wasn't vaccinated  
because she was breastfeeding, although her pediatrician  
and obstetrician urged her it was safe. She had to be hos-  
pitalized but eventually got a shot.

Others, though, take out their anger on health care  
providers. Some threaten to call attorneys if they don't get  
a prescription for Ivermectin, commonly used by veteri-  
narians to kill worms and parasites. The drug can cause  
harmful side effects and there's little evidence it helps  
with the coronavirus.

He estimates that he has cared for 100 patients who  
have died since the pandemic began, including the man  
who threatened to walk out of the hospital.

### ILLINOIS FAMILY PHYSICIAN

Traces misinformation back to Scripture, Nicki Minaj

Dr. Carl Lambert hears lots of wild misinformation  
from his patients. Some comes from the Bible interpreta-  
tions; some originates from the rapper Nicki Minaj.

Some of it is the stuff of internet conspiracy theories,  
like there's a chip in the vaccine that will take over their  
DNA.

"Impossible scientifically," says the family physician in  
Chicago. He also hears patients tell him that the vaccine  
will weaken their immune systems. He responds: "Immu-  
nology 101. Vaccines help your immune system."

Recently he received a flurry of messages from pa-  
tients who were worried about damage to their testicles  
— a rumor he ultimately traced back to an erroneous  
tweet from Minaj alleging that the vaccine causes impo-  
tence.

"And I was like, 'That's outlandish. That's a bit outa-  
geous.' So a lot of just kind of counseling that I did not ex-  
pect to have to do."

Some of the misinformation is delivered from the pul-  
pit, he said. People have sent him sermons of preachers  
saying the vaccine is "ungodly or there's something in it  
that will mark you," a reference to a verse in Revelation  
about the "mark of the beast" that some Christians cite in  
not getting vaccinated.

"There's a mixture of like almost fear ... and saying,

### Fear of vaccine side effects, then fear of dying

When Dr. Elizabeth Middleton talks to COVID-19 pa-  
tients about why they aren't vaccinated, they often cite  
fear of side effects. But as they get sicker and sicker, a dif-  
ferent sort of fear sets in.

"They sort of have this sinking look about them, like  
'Oh, my God. This is happening to me. I should have been  
vaccinated,'" said the pulmonary critical care doctor at  
the University of Utah hospital in Salt Lake City.

She hears often that the vaccine was developed too  
quickly. "Who are you to judge the speed of science?" she  
wonders.

Also frustrating is the idea among some patients that  
there is a "secret agenda" behind getting vaccinated.

"There must be something wrong if everyone is forc-  
ing us to do this or everyone wants us to do this," patients  
tell her. "And my response to that is, 'They are urging you  
to do it because we are in an emergency. This is a pan-  
demic. It's a national and international crisis. That's why  
we are pushing it.'"

Getting through to patients and their families is a  
"delicate line," she says. She tries not to disrupt the pa-  
tient-doctor relationship by pushing vaccines too hard.  
But often the people who have been on ventilators need  
no convincing.

"They are like, 'Tell everyone that they have to be vac-  
cinated. I want to call my family. They need to be vacci-  
nated.'"

### MENTAGY DOCTOR

Political views come into clear focus after diagnosis

Dr. Ryan Stanton recently had a patient who began  
their conversation by saying, "I'm not afraid of any Chi-  
na virus." From that point on, he knew what he was up  
against in dealing with the patient's politics and misguid-  
ed beliefs about the virus.

Stanton blamed people like far-right conspiracy theo-  
rist Alex Jones for spreading some of the misinformation  
that has taken root among his patients. Among them is  
that the vaccine contains fetal cells. Another said it "is a  
simple fact that the vaccine has killed millions."

"In fact," he said, "that couldn't be more wrong."

It's tough to watch, especially after living through the  
early surges. On his worst shift last fall, an elderly nurs-  
ing home patient arrived, close to death. She hadn't seen  
her family in months, so staff wheeled her outside in the  
ambulance bay so her relatives could say their goodbyes  
from 20 feet away. He snapped a picture of the scene so he  
could remember the horror.

There was hope after the vaccines arrived, but then  
came the delta variant and a slowdown in immunizations.

"Really it amazes me the number of people who have  
this huge fear, conspiracy theory about vaccines and will  
honest to God try anything, including a veterinary medi-  
cine, to get better," said Stanton.

WINTER

adn.com/weather

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

BOBBIE MCDOW,

Plaintiff,

vs.

Case No. 3AN-21-05615 CI

LORA REINBOLD,

Defendant.

AFFIDAVIT OF BOBBIE MCDOW IN SUPPORT OF  
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I, Bobbie McDow, declare under penalty of perjury:

1. I am a constituent of State Senator Lora Reinbold.
2. I have used the "Senator Lora Reinbold" Facebook page.
3. I have commented on State Senator Reinbold's posts on the "Senator Lora Reinbold" Facebook page.
4. I have responded and replied to various comments made by others on posts on the "Senator Lora Reinbold" Facebook page.
5. I have responded to posts made by State Senator Reinbold on the "Senator Lora Reinbold" Facebook page through "liking" the posts.
6. I have responded to comments by other people, besides State Senator Reinbold, on posts on the "Senator Lora Reinbold" Facebook page through "liking" those comments.
7. I was banned from the "Senator Lora Reinbold" Facebook page, including on April 29, 2021.



Northern Justice Project, LLC  
A Private Civil Rights Firm  
406 G Street, Suite 207  
Anchorage, AK 99501  
Phone: (907) 308-3395; Fax: (866) 813-8645

8. This banning occurred after, among other things, after I critiqued State Senator Reinbold's position against wearing masks during the COVID-19 pandemic.

9. When I was banned from the "Senator Lora Reinbold" Facebook page, I was no longer able to like or comment on posts by State Senator Reinbold, or on comments that others posted on the page. I was also no longer able to access the "message" option on the page. And my past comments and replies were removed or hidden from the page.

FURTHER AFFIANT SAYETH NAUGHT.

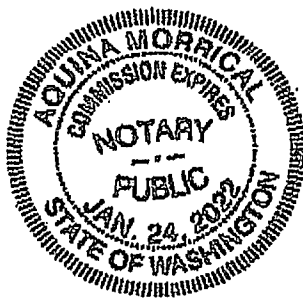
VERIFICATION

I, BOBBIE MCDOW, say on oath or affirm that I have read the foregoing affidavit in its entirety and believe to the best of my knowledge that all statements made therein are true and complete.

Bobbie McDow

BOBBIE MCDOW

SUBSCRIBED AND SWORN TO before me this 21<sup>st</sup> day of October 2021 at Benton County, Washington.



Aquina Morriscal  
Notary Public for the State of Washington  
My Commission Expires: 01/24/2022

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

BOBBIE MCDOW,

Plaintiff,

v.

LORA REINBOLD,

Defendant.

FILED in the TRIAL COURTS  
STATE OF ALASKA, THIRD JUDICIAL DISTRICT

NOV 15 2021

Clerk of the Trial Courts

By \_\_\_\_\_ Deputy

Case No. 3AN-21-05615CI

OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT &  
CROSS-MOTION FOR SUMMARY JUDGMENT

(2)

COMES NOW the Defendant, Lora Reinbold, by and through her counsel of record, Heather M. Brown of Franich Law Office, LLC, and hereby Opposes Plaintiff's Motion for Partial Summary Judgment, and Cross-Moves the Court for an Order of Summary Judgment in Defendant's favor, acknowledging that her Facebook Page is not a public forum, and any actions taken on the Page by Defendant are her private actions, not those of the State.

Defendant's Opposition is supported by the Memorandum set forth below, and Affidavit of Defendant filed contemporaneously hereto. All facts previously alleged by Defendant, in her Motion to Dismiss and her Answer, are hereby incorporated as if fully set forth herein.

An appropriate Order denying Plaintiff's Motion, and granting Defendant's Cross-Motion, is lodged herewith.

MEMORANDUM

Plaintiff alleges that State Senator for Alaska's District G violated Article I, Section 5 of the Alaska Constitution, Plaintiff's right to free speech, by blocking Plaintiff from commenting on Defendant's posts to her personal Facebook Page and, from replying to the comments of Defendant's other Page viewers, for a day. However, Defendant's acts – in



“blocking” Plaintiff from her personal Facebook Page for a day – were her own acts, done in her personal capacity, not in her official capacity, or by anyone on her legislative staff. Plaintiff is suing Defendant in her personal capacity; Plaintiff is not suing Defendant in her official capacity; Plaintiff is not suing Defendant as Senator for the State’s District G.

Article I, Section 5 of the Alaska Constitution provides that “every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right. Article I, Section 5 of the Alaska Constitution, like the First Amendment to the United States Constitution, protects individuals against abridgments of their speech by the government, in public forums, and not against interference attributable to private actions in private forums. There are two well established principles of law at issue here, the public forum doctrine, and the state action doctrine, the latter of which only comes into play if a forum is determined to be public, and not private.

**I. DEFENDANT’S FACEBOOK PAGE IS NOT A PUBLIC FORUM**

“The public forum doctrine . . . can be briefly stated as follows: Once there exists a government-controlled forum for the dissemination of information and expression of ideas, the government cannot deny equal access to that forum based on content alone. This equality of access is compelled by both the First Amendment and the equal protection clause. (. . . ) [G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. (. . . ) Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. Although the government may not restrict access to a public forum based on content alone, it may, however, place reasonable restrictions on the ‘time, place and manner’ of the exercise of

expressive rights. In other words, while the government may reasonably regulate expressive activity, it may not censor such activity.”<sup>1</sup> A public forum is not something that is created by inaction, or out of thin air – or even by a single person; the government creates a public forum only with purposeful government action with the intent to opening a non-traditional forum for public discourse.<sup>2</sup>

As the Court noted in *The Alaska Gay Coalition v. Sullivan*, “[i]n the majority of cases dealing specifically with the public forum issue, the question has been whether a particular place, rather than a publication, was a public forum. Public streets, sidewalks and parks were early designated public forums. Courts have since then found a wide variety of places to be public forums including municipal auditoriums, a public-school auditorium, city-owned airports, a state house rotunda, public utility poles where use was specifically permitted by ordinance, and a state-owned bus terminal. In addition, limited public forums have been found when the state sponsors a one-time event and provides members of the public with an opportunity for expression.”<sup>3</sup> A publication may be considered a public forum to which equal access must be afforded; for example, a publication by an agency of the state like a state university campus newspaper, and other publications which are prepared and published by the government, for the purposes of disseminating information regarding public and private services, and dedicated to expressive and associational use.<sup>4</sup> The Alaska Courts have yet to address the issue of whether a social media Page controlled by an individual person, and a private company, may be considered a “public forum.”

<sup>1</sup> *The Alaska Gay Coalition v. Sullivan*, 578 P.2d 951, 955 (Alaska 1978) (internal citations omitted).

<sup>2</sup> See *Walker v. Texas Division, Sons of Confederate Veterans*, 576 US 200 (2015); see also *Perry v. McDonald*, 280 F.3d 159, 166 (2<sup>nd</sup> Cir. 2001).

<sup>3</sup> *The Alaska Gay Coalition v. Sullivan*, 578 P.2d 951, 956 (Alaska 1978) (internal citations omitted).

<sup>4</sup> See *The Alaska Gay Coalition v. Sullivan*, 578 P.2d 951, 957 (Alaska 1978) (internal citations omitted).

Defendant's Facebook Page is not a public forum - it belongs to Defendant, and Facebook. It does not belong to the State, it does not belong to the public at large, and it does not belong to Plaintiff, none of whom have any control over Defendant's Page or its content.

Defendant maintains a personal social media "profile" on Facebook which is linked to her personal Facebook "Page." Defendant's Facebook Page was not created nor is it supported by the legislative informational technology (IT) department; Defendant's Facebook Page was created, is administered, and managed by herself in a personal capacity, and of her own volition. Defendant's Facebook Page is not an official State of Alaska Page, it is not supported or funded by the State of Alaska, nor is it a function of the legislature.

Defendant's Facebook Page is not something Defendant operates in her official capacity as Senator. It is not a function of her status as an elected official, nor is it official business. It is Defendant's personal choice to maintain the Page, and to communicate on it with her viewers, when she desires to and as she sees fit to do, or not to do. It is her Page, not a public park, or governmental forum, where anyone can do or say whatever they wish. Defendant's Page is not an official way to communicate with her. Pages such as Defendant's are mere mechanisms through which Facebook users may express their views and engage—or decline to engage—with other users, they are not themselves a "forum" in any sense of the word, public or otherwise.

## II. DEFENDANT'S OPERATION OF HER PAGE IS NOT STATE ACTION.

The "state action" doctrine, can be briefly stated as follows: The People's right to free speech, like other rights protected by the United States' Constitution, is implicated only when the government, not a private entity or individual, regulates speech.<sup>5</sup> This precondition for a constitutional claim is known as the "state action" requirement. To succeed on her free-speech

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<sup>5</sup> *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

claim, therefore, Plaintiff must show that Defendant's decision to block her from interacting with the Defendant's personal Facebook Page was an act attributable to the state, not a private individual. "[C]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."<sup>6</sup> To constitute state action, the alleged deprivation of a right "must be caused by the exercise of some right or privilege created by the State . . . or by a person for whom the State is responsible," and "the party charged with the deprivation must be a person who may fairly be said to be a state actor."<sup>7</sup> The distinction between private and state action is a "fact-bound inquiry" that depends on whether there is "a close nexus between the State and the challenged action."<sup>8</sup>

Like the public forum doctrine, the Alaska Courts, the US Supreme Court and the Ninth Circuit have yet to analyze the what constitutes "state action" in the context of social-media blocking. Our Court has expanded the state-action doctrine, in the context of a due process claim, to include private entities acting on the government's behalf or otherwise intertwined with the government.<sup>9</sup> The Court has also analyzed an abuse of process claim, for an alleged deprivation of rights under 42 USC § 1983, adopting the traditional definition of "acting under color of state law" such a defendant alleged to have deprived a claimant of his/her rights must have exercised power which he or she "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," noting that private parties could be considered as acting under color of state law if they were to "conspire with a state actor."<sup>10</sup> The Court has not expanded the state action doctrine to include the actions of individual persons, or those of elected officials. However, if the Court had done so, even in this expanded context, there

<sup>6</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

<sup>7</sup> *West v. Atkins*, 487 U.S. 42, 49 (1988).

<sup>8</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 298 (2001).

<sup>9</sup> See *Anderson v. Alaska Housing Finance Corp.*, 462 P.3d 19 (Alaska 2020).

<sup>10</sup> See *DeNardo v. Cutler*, 167 P.3d 674, 678-679 (Alaska 2007).

is little applicability to social-media-blocking cases where a single elected official commits the relevant act on her own initiative.

Lacking controlling precedent, Plaintiff cites out-of-circuit authority. One decision she relies on involved the chair of a county board who blocked and banned a constituent from participating on the “county Facebook Page.”<sup>11</sup> There, the Fourth Circuit agreed with the district court’s finding that the chairwoman was “acting under color of state law” pursuant to 42 U.S.C. § 1983.<sup>12</sup> The circuit and district court looked to things such as the title of the social-media Page, the Page’s categorization on Facebook, the contact information listed on the Page, and the content of the Page’s posts to determine whether a ban or block constituted state action.<sup>13</sup>

The other decision Plaintiff cites to is from the Second Circuit, which relied on similar factors to determine that former-President Donald Trump’s blocking of a constituent on Twitter amounted to state action.<sup>14</sup> The court noted that there was “substantial and pervasive government involvement with, and control over” the relevant Twitter account.<sup>15</sup> Factors favoring a finding of state action, according to the Second Circuit, included: the account’s reference to the official @POTUS account, the then-President’s use of Twitter as a “tool of governance and executive outreach,” his use of Twitter to engage with foreign officials, his use of Twitter to hire and fire staff, and his use of Twitter to announce changes to national policy.<sup>16</sup> However, the Second Circuit’s decision was vacated by the Supreme Court, and no longer has any legal effect.

As noted above, to constitute state action, the alleged deprivation of a right “must be caused by the exercise of some right or privilege created by the State . . . or by a person for

<sup>11</sup> *Davison v. Randall*, 912 F.3d 666, 673 (4th Cir. 2019), *as amended* (Jan. 9, 2019).

<sup>12</sup> *Id.* at 679–81.

<sup>13</sup> *Id.* at 678–81.

<sup>14</sup> *Knight First Amend. Inst. at Columbia Univ. v. Trump (Knight)*, 928 F.3d 226, 234 (2d Cir. 2019), *cert. granted, judgment vacated as moot sub nom. Biden v. Knight First Amend. Inst. at Columbia Univ. (Knight II)*, 141 S. Ct. 1220 (2021).

<sup>15</sup> *Id.* at 235.

<sup>16</sup> *Id.* at 235–36.

whom the State is responsible,” and “the party charged with the deprivation must be a person who may fairly be said to be a state actor.”<sup>17</sup> The distinction between private and state action is a “fact-bound inquiry” that depends on whether there is “a close nexus between the State and the challenged action.”<sup>18</sup> For example, in *Davison v. Randall*, the Court found that the Page at issue was a public forum, and that the banning at issue was state action, based upon several facts, many of which Plaintiff fails to mention, and do not exist in this case, such as that:

- Randall’s Chief of Staff also shared administrative control over the Chair Page;
- The Chair Page provided contact information for her county office, including her office telephone number her county email address, and the internet address for the official county website;
- On her Campaign Page, Randall characterized her Chair Page as her county Facebook Page, she asked her constituents to reach out to her on her “county Facebook Page” (Chair Phyllis J. Randall), or via email to her government email address, instead of on her Campaign Page;
- Randall publicized the Chair Page in her official Chair Newsletter, offering a link to the Page at the end of her Newsletter, prepared by County employees, hosted on the County website, and distributed to citizens via Randall’s official county email account;
- In other emails, sent to constituents from Randall’s official county email account, regarding winter storms, she advised recipients to visit her Chair Page for updates;
- Her posts dealt with numerous aspects of her official responsibilities;
- She posted notifications to the public about upcoming Board meetings, and the agenda for those meetings;
- She used the Page to notify constituents about significant public safety issues; and,
- She used the Page to coordinate the County’s response to a large snow storm, communicating with her constituents on the Page regarding which streets needed plowing.<sup>19</sup>

Defendant does none of these things with, or on, her Page. Defendant’s Facebook Page was not created nor is it supported by the legislative informational technology (IT) department; Defendant’s Facebook Page was created, is administered, and managed by herself in a personal capacity, and of her own volition. Defendant’s Facebook Page is not an official State

<sup>17</sup> *West v. Atkins*, 487 U.S. 42, 49 (1988).

<sup>18</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295, 298 (2001).

<sup>19</sup> *Davison v. Randall*, 912 F.3d 666, 673-74 (4th Cir. 2019), *as amended* (Jan. 9, 2019).

of Alaska Page, it is not supported or funded by the State of Alaska, nor is it a function of the legislature.

Defendant's Facebook Page is not something Defendant operates in her official capacity as Senator. It is not a function of her status as an elected official, nor is it official business. It is Defendant's personal choice to maintain the Page, and to communicate on it with her viewers, when she desires to and as she sees fit to do, or not to do. Defendant uses her Page to express her own views and to help educate her viewers about issues in Alaska.

What Plaintiff asks the Court to do here, is to find that the text of the Constitution supports a process of adding up the content of an official's social-media posts to determine whether some critical mass of state action has been reached that would make the entire operation of the account state action and a public forum. These factors might tell us if an official is using an account for official business, but that seems far afield from answering the question of whether a member of the State legislature's temporary blocking of another Facebook user from commenting on her posts, to her personal Page, but not from viewing or sharing said posts, meets the requirements for state action the Supreme Court laid out in *West*.<sup>20</sup> That an account might be used for official purposes in one instance does not necessarily turn everything the account holder does into state action (just as, for example, a public official's use of a particular phone to take various official actions would not be determinative of whether *every* action taken on that phone amounted to state action). Additionally, *Davison* and *Knight* are further distinguishable because both defendants used government staff to operate the social-media Pages in question.<sup>21</sup>

Perhaps with an official Page, one created by the State legislature, for Defendant as Senator to District G, blocking a user might be considered "the exercise of some right or

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<sup>20</sup> 487 U.S. 42, 49 (1988).

<sup>21</sup> *Davison*, 912 F.3d at 673; *Knight*, 928 F.3d at 235.

privilege created by the State.”<sup>22</sup> But the same does not follow for a Page created by an individual, which is what is at issue here. Nor can it be argued that in general “the State is responsible” for the actions of members of the legislature.<sup>23</sup> Members of Congress, acting as a group through the legislative process, are responsible for the actions of the state, not the reverse.

Ultimately, “the party charged with the deprivation must be a person who may fairly be said to be a state actor.”<sup>24</sup> What all these cases show is that it is not enough for the “actor” to be drawing a government paycheck, or even to be someone who has some authority to act on behalf of the state. The particular action in question must, to implicate the Constitution, be undertaken on behalf of the state.

Defendant alone, like other members of the State legislature, has almost no power to act on behalf of the Alaska government. Her authorized powers, and those of her colleagues, are important, but few. She can propose bills and vote on bills, among other things, and those are profound powers which she has. Ultimately however, it is the legislature as a whole, which is in control of the ship of state. But individual members of the legislature, unlike executive branch officials, generally do not have authority to act on behalf of the state.

*Davison* and *Knight* both involved the accounts of executive-branch officials, limiting the applicability of those decisions here. Legislators’ authority to act on behalf of the state is much more limited than that of executive-branch officials.<sup>25</sup> The “official capacity” of a member of the executive branch is categorically dissimilar from the “official capacity” of a member of Congress—not just in degree, but in kind. Put simply, legislators legislate. Their state-created powers are to propose legislation and to vote—and little else. Blocking a Facebook user

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<sup>22</sup> 487 U.S. at 49.

<sup>23</sup> *Id.* (finding that State was responsible for doctor employed as contractor for state prison).

<sup>24</sup> *West*, 487 U.S. at 54.

<sup>25</sup> See *Campbell v. Reisch*, 986 F.3d 822, 827 (8th Cir. 2021).



from commenting on her Page, or posts, was something Defendant could do before she was in office and something she can do after she leaves office. If the Defendant's position in government makes no difference to her ability to take the action in question, it is hard to see how the action could be deemed to be one taken under authority created by the State or on its behalf. It is not a state-created right or privilege and therefore cannot constitute state action.

Individual legislators do not have the constitutional power to either make law or abridge speech, and thus their individual actions are not within the First Amendment's coverage, nor the coverage provided by the Art. I, Sec. 5 of the Alaska Constitution. The State does not authorize Defendant to run her Facebook Page, and her use of the Page does not amount to action on the government's behalf.

**III. DEFENDANT IS ENTITLED TO OPERATE HER PAGE THE SAME AS ANY PRIVATE CITIZEN IS ENTITLED TO.**

While individual legislators do not have the constitutional power to either make law or abridge speech, they do still enjoy the same rights as private citizens. In *Alsworth v. Seybert, et al.*, the Supreme Court for the State of Alaska correctly noted that "[l]imiting elected officials' speech protections runs counter to the jurisprudence of the U.S. Supreme Court and [the Alaska Supreme Court]. . . . [L]egislators' First Amendment rights are as broad as those of private citizens."<sup>26</sup>

Here, Plaintiff is suing Defendant as an individual in her personal and unofficial capacity, therefore explicitly acknowledging that Defendant's Page is administered and managed by Defendant, with the permission of Facebook who "owns" the Page, and that the Page is not managed or owned by the State of Alaska, or other government entity. Simply stated, Defendant's Facebook Page is a place for Defendant to express her own opinions.

<sup>26</sup> *Alsworth v. Seybert, et al.*, 323 P.3d 47, 57-58 (Alaska 2014) (citing *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966)).

It is Defendant's personal choice to maintain the Page, and to communicate on it with her viewers, when she desires to and as she sees fit to do, or not to do. It is her Page, not a public park, or governmental forum, or even a governmental publication, where anyone can do or say whatever they wish, nor was such a forum ever contemplated or intended by Defendant when she created it. Defendant's Page is not an official way to communicate with her. Defendant uses her Page to express her own views and to help educate her viewers about issues in Alaska.

Defendant, like other state legislators, is able to regulate the content of her personal Facebook Page and to take down posts, or block viewers from commenting directly on her posts, as she deems necessary. Defendant made the rules of her Page clear, and the Plaintiff violated them, insulting others' religion, asserting that some were members of Qanon, and even calling for Defendant to resign from her position. Defendant did not block Plaintiff indefinitely, only temporarily. This is a tool offered to all members of Facebook, the use of which is encouraged by Facebook as needed.<sup>27</sup> This is not viewpoint discrimination as Plaintiff alleges. The constitutional right of a private individual to express his or her views in an allegedly public forum only comes into play only when the property, or "forum," in question is in fact a public forum, one that is owned or controlled by the government, and the individual's exclusion from that forum is the product of state action. Those elements are plainly not met here.

Defendant's use of her Facebook page is not unlike many those of many other state legislators operating similar Facebook Pages, all of whom also make use of this "blocking" feature, whether their Page is personally managed or not and, most all of which clearly say that their Page rules will be enforced by removal of comments and/or blocking. For example, Senator David Wilson's official Facebook Page has an express Code of Conduct, which states:

To maintain the civility of the Senate Majority Facebook Page, we may hide or ban users who repeatedly engage in the use of the following:

<sup>27</sup> 08/09/2021 Motion to Dismiss Exhibit A. See also,

Obscenities and vulgarities, even using various symbols for letters, or shorthand (e.g., text messaging abbreviations).

Personal attacks on an individual, group, or class.

Spam, advertising, or off-topic comments. This can include posting a link to a website, even if it's non-commercial, that isn't related to the post.

Confidential information you don't have a right to post. If the information isn't publicly known, then it's best kept to yourself.

Misinformation, particularly if it appears intentional or is a recurring problem.<sup>28</sup>

Likewise, Senator Shelley Hughes' Page, an official government Page managed by her state office, provides a "Comment Policy" which states:

This is an informational and legislative site managed by the state office of Senator Shelley Hughes. Accordingly, although Sen. Hughes values all responsible feedback - including those that convey opposition to her positions - and each person's right to freedom of speech, if comments are threatening, violent, vulgar, abusive, defamatory, illegal, disrespectful to the rights of others, disparaging on the basis of race, color, religion, gender or national origin, of a harassing nature, or infringing on other people's right to free speech, her office reserves the right to remove them. Please also note that because this site is managed from a state legislative office, comments that are election-related are not permitted and will be deleted.<sup>29</sup>

Similarly, Senator Mike Shower's Page, states:

Foul language, personal attacks, repeated uncivil and disrespectful comments are not permitted on this Page. This includes libelous, false or otherwise baseless accusations. Those doing so will be blocked from commenting by admins.<sup>30</sup>

Plaintiff and her counsel are correct in the aspect that the First Amendment protects speech from government censorship. It is written for the protection of all citizens alike, protecting both Plaintiff and Defendant equally. If Plaintiff had been banned from the official Sen. Lora Reinbold site that is maintained by the State of Alaska, from contacting Defendant either through her legislative office, or even through Defendant's State electronic mailing address, then Plaintiff would have a legitimate claim for infringement of her right to free speech and request relief from the Court. This is not the case here, and the mere fact that Defendant is an elected

<sup>28</sup> 08/09/2021 Motion to Dismiss Exhibit O.

<sup>29</sup> 08/09/2021 Motion to Dismiss Exhibit P.

<sup>30</sup> 08/09/2021 Motion to Dismiss Exhibit Q.

official, does not mean that she is no longer entitled to the enjoyment of her own civil liberties – to speech, and association, and more – which she had as a private person. Alaska law on this is well-settled: “legislators’ First Amendment rights are as broad as those of private citizens.”<sup>31</sup>

Furthermore, 47 USC § 230(c)(2)(A) prohibits civil liability for Plaintiff’s claims. The Good Samaritan provision of the Communications Decency Act (CDA) states that, “No...user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the...user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>32</sup> Congress expressly preempted the field: “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”<sup>33</sup>

The facts supporting dismissal pursuant to the CDA are undisputed. The Facebook page at issue is an interactive computer service under the CDA. Likewise, Defendant is a user of that interactive computer service. Plaintiff complains that Defendant voluntarily restricted access to and availability of Plaintiff’s comments, material which Defendant considers to be harassing, or otherwise objectionable.<sup>34</sup> Evidence of Defendant’s actions being taken in good faith are undisputed.<sup>35</sup> Therefore, because the conduct Plaintiff alleges Defendant committed, removing Plaintiff’s objectionable and harassing content from an interactive computer service, falls under

<sup>31</sup> *Alsworth v. Seybert, et al.*, 323 P.3d 47, 57-58 (Alaska 2014) (citing *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966)).

<sup>32</sup> 47 U.S.C. § 230(c)(2)(A).

<sup>33</sup> 47 U.S.C. § 230(e)(3).

<sup>34</sup> 08/09/2021 Motion to Dismiss, Exhibits D, E, F, G, H, I, J, K and L.

<sup>35</sup> 08/09/2021 Motion to Dismiss, Exhibits D, E, F, G, H, I, J, K and L.

the provisions of the CDA, Defendant enjoys total immunity from liability and damages, and Plaintiff's Complaint should be dismissed in its entirety.

Simply by suing Defendant individually, and not in Defendant's official capacity, Plaintiff has acknowledged the personal and individual liberty of Defendant, thereby explicitly acknowledging that Defendant's Page is just that: Defendant's personal Page. The Page belongs to Defendant, not the State of Alaska, and it is entirely separate from the state government; the foundations of its existence are the private and sovereign acts of Defendant. Therefore, Defendant has every natural right to accept or dismiss anyone's opinion, on any issue, having the same protections which Plaintiff invokes, herself. Barring Defendant from using her personal Facebook Page as she chooses, and forcing Defendant to receive and maintain commentary on her Page from another Facebook user, which she finds objectionable, harassing and otherwise offensive, would itself be an impermissible prior restraint on Defendant's speech and Defendant's right of association in violation of Article I, Section 5 of the Alaska Constitution, and a violation of the Communications Decency Act.

#### IV. CONCLUSION

Defendant had a personal Facebook profile, and a personal Facebook Page prior to becoming an elected official. Since being elected Senator, Defendant continues to have a personal Facebook profile, and a personal Facebook Page. When Defendant no longer holds public office, Defendant will likely continue to have a personal Facebook profile, and a personal Facebook Page, just as Defendant did before she was elected Senator. Defendant uses both her personal Facebook profile, and her personal Facebook Page for her own expression and enjoyment of her individual rights to free speech and association, pursuant to the terms of its use set forth by Facebook and as permitted by the Communications Decency Act.

For these reasons, and those set forth above, Defendant respectfully requests the Court deny Plaintiff's Motion for Partial Summary Judgment, and grant Defendant's Motion for Summary Judgment, acknowledging that Defendant's Facebook Page is not a public forum, and any actions taken on the Page by Defendant are her private actions, taken in good faith, and not those of the State.

Dated: November 15, 2021

FRANICH LAW OFFICE, LLC  
Attorneys for Defendant

By:   
Heather M. Brown, ABA No. 1405033

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was provided to each attorney or party of record, via ☐ Courier, ☐ USPS First Class Mail, ☒ Electronic Mail ☐ Facsimile ☐ Hand-Delivery, ☐ True-Filing, as follows:

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